SUPREME COURT OF THE UNITED STATES.

No. 256.—October Term, 1925.

Perry Browning et al., Appellants, *vs.* E. M. Hooper et al.	Appeal from the United States District Court for the Northern District of Texas.

[January 4, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

Appellants own taxable real and personal property in that part of Archer County, Texas, defined as Road District No. 2. The appellees are the county judge and four commissioners, (constituting the county commissioners' court) the tax assessor and the sheriff of the county, who is the tax collector. Appellants brought this suit to restrain the issue or sale of bonds of the road district in the amount of $300,000 proposed to be sold to obtain money for the construction, operation, and maintenance of roads in that district, and to restrain the levy or collection of any tax upon their property to pay any part of the interest or principal of the bonds. They seek relief on the ground that the creation of the road district and the enforcement of the proposed tax, will deprive them of their property without due process of law in violation of the Fourteenth Amendment. The District Court dismissed the complaint. 3 F. (2d) 160. The case is here on direct appeal. § 238, Judicial Code.

The Texas statutes (Vernon's Complete Texas Statutes, 1920) provide: "Any county . . . or any political subdivision or defined district, now or hereafter to be described and defined, of a county," is authorized to issue bonds, not to exceed one-fourth of the assessed valuation of real property in the district, for the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, and to levy and collect taxes to pay them. Art. 627. Upon the petition of 50 resident property taxpaying voters of any defined district of any county, it is the duty of the commissioners' court to order an election in the district as described

in the petition to determine whether its bonds shall be issued for such road purposes, and whether a tax shall be levied upon the property of the district for their payment. Art. 628. If two-thirds of the votes cast are in favor of the proposition, the commissioners' court is required to issue and sell the bonds. Art. 631. But before they are put on the market, the court is required to levy a tax sufficient to pay the debt as it matures. The assessments are to be made on the same valuation, and they become liens and may be enforced in the same manner as state and county taxes. Arts. 634, 2827, 2836. For the purposes of the act, any district accepting its provisions by such vote is thereby created a body corporate which may sue and be sued. Art. 637.

Archer County is about 30 miles square, and has a population of between 5000 and 6000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal aided state highway, and about 20 miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam about six miles northwest. About 18 miles of the Southwest Trail lies between Archer City and a point on the north line of the county about six miles from its northeast corner. There is another highway extending from a point on the Southwest Trail about two miles south of the county line to Holliday on the Ozark Trail about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them.

January 17, 1924, there was presented to the commissioners' court a petition signed by 74 persons. It prayed an election to determine whether bonds of the territory, therein described by metes and bounds, and to be designated as "Road District No. 2 of Archer County, Texas", should be issued for road purposes in the amount of $300,000; and whether a tax should be levied upon the property therein to pay the bonds. The commissioners' court by order established the district within the metes and bounds and for the purposes set forth in the petition, and declared it to be a body corporate. On the same day the court fixed the time and place for an election. Its result was 303 votes for and 102 against the

bond issue. Thereupon the court ordered the bonds to be issued, and levied the taxes. Before the election was called, the court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday, furnished 252 votes for the bond issue,—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359, of which $257,080 belongs to appellants, and $111,388 to petitioners; and $60,500 of that amount belongs to one signer, leaving only $50,888 to the other 73. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner. The evidence persuasively supports appellants' contention that the improvements of the roads designated will not benefit their property. Moreover, the inclusion of their lands in that road district makes it impossible until the last bonds mature 30 years hence, to create another road district to raise money for the improvement of roads needed to serve the territory in which their lands are situated. Art. 637d.

Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads. *Missouri Pacific Railroad* v. *Road District*, 266 U. S. 187, 190. The proceedings in this case cannot be sustained as the levy of a general tax. The commissioners' court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242; Constitution Art. VIII, § 9. The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election. Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will

cease to exist as a body corporate upon the payment of the bond debt. It is clear that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements. *Embree* v. *Kansas City Road District*, 240 U. S. 242, 247; *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197, 209.

The legislature did not create the road district, levy the tax or fix the amount to be raised. Under the act, road districts are not required to correspond with or to include any political subdivision. *Moore* v. *Commissioners' Court*, (Tex. Civ. App.) 175 S. W. 849; *Bell County* v. *Hines*, (Tex. Civ. App.) 219 S. W. 556. There is nothing in the law to guide or to limit the action of the signers of the petition in selecting property to be assessed. Subject to the vote of a district of their own choice, the petitioners' designation is absolute. The commissioners' court has no power to modify or deny; it is bound to grant the petition. *Huggins* v. *Vaden*, (Tex. Civ. App.) 253 S. W. 877, 878; 259 S. W. 204, 206; *Meurer* v. *Hooper*, (Tex. Civ. App.) 271 S. W. 172, 176. And when the required vote is given, the court, once for all, must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures. The opinion of the District Court states that the road district "was composed of two of the precincts of Archer County—'political subdivisions' of the county well recognized and ascertained long before the controversy." We find nothing in the record to support the statement. But, if true, it does not tend to show that the legislature created the road district. A political subdivision is not a "defined district" within the meaning of the Texas Constitution (Art. III, § 52) or of the act. It has been held by the Texas Court of Civil Appeals that a "defined district" means a defined area in a county, and less than a county, other than a political subdivision of a county. *Bell County* v. *Hines*, *supra*, 557. The fact that the metes and bounds describing the road district happened to coincide with the external boundaries of two adjoining commissioners' precincts does not support the contention that the road district was created by the legislature. For the election of commissioners, each county is divided into four precincts, from each of which a commissioner is elected. These precincts are not defined by the legislature, but by the commissioners' courts. Art. 1356; Constitution, Art. V, § 18. They are political subdivisions, but, unlike road districts, they are not bodies corporate. See *Ex parte Haney*, 51 Tex. Cr. Rep. 634; *Cofield* v.

Britton, (Tex. Civ. App.) 109 S. W. 493, 496. They are not taxing or assessment districts; their powers and functions are wholly different from those of a road district. And plainly, the authority granted (Art. 627) to issue road bonds up to one-fourth the assessed valuation and to levy taxes ratably to pay them is not a legislative determination of the rate or amount of the tax imposed on appellants' property. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden. These were fixed by the petition and election. The legislature may make assessments for local improvements ratably on the basis of property valuation (*Valley Farms Co.* v. *Westchester,* 261 U. S. 155); but, where the amount to be raised is determined and the property to be assessed is selected as in this case, the requirement that the burden shall be so spread is not a legislative assessment.

Where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. *Valley Farms Co.* v. *Westchester, supra; Hancock* v. *Muskogee,* 250 U. S. 454, 459; *Withnell* v. *Construction Co.,* 249 U. S. 63, 69; *Wight* v. *Police Jury,* 264 Fed. 705. But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the State to hear them, or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due process clause of the Fourteenth Amendment. *Embree* v. *Kansas City Road District, supra,* 251.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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The procedure adopted by Texas in organizing road districts and issuing bonds, is not only justified by the decisions of the Courts, but is sanctioned by a line of decisions of the Supreme Court of the United States sustaining bonds and taxes over a period of fifty years. No question as to the validity of the districts or the regularity of the procedure has been suggested in these decisions 69

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*, Appellants, v. E. M. HOOPER, E. A. MCDONALD, A. L. BISHOP, *et al.*, Appellees.	No. 256.

PETITION FOR REHEARING AND ARGUMENT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Dan Moody, Attorney General of the State of Texas, respectfully shows that your petitioner is the Attorney General of Texas, and the successor in office of the Hon. W. A. Keeling, named in the Bill of Complaint herein and upon whom notice was served; that your petitioner has appeared herein as attorney and of counsel for the defendants in this action; that this Court has heretofore given him leave to petition for a rehearing and this petition is filed pursuant to the leave so granted.

Your petitioner further represents and states to the Court that the opinion in this action declares

to be unconstitutional a statute of the State of Texas; that under that statute and other statutes of the State of Texas, it is made the duty of the Attorney General of the State to examine the proceedings in relation to issues of bonds made under the provisions of acts of the Legislature; that a very large amount of securities has been so issued and that all of these securities issued by defined districts of counties are brought in question by the decision of this Court in this action.

Your petitioner also respectfully shows and represents to the Court, that the State School Fund of the State of Texas holds a large amount of bonds issued by Road Districts of the State of Texas, organized under the statute so held to be unconstitutional; that the decision of this Court in this case casts a cloud upon the validity of the above securities, and seriously affects the marketability of the same, and the value thereof as an investment.

That since the opinion in this case was handed down on January 4, 1926, it has received great publicity and your petitioner has been advised by counsel and by bankers that large amounts of securities issued by districts in other States are seriously affected by the opinion of the Court herein.

Your petitioner also respectfully shows to the Court that, since the opinion herein was handed down, the principles embodied therein, the practice under the act of the State Legislature of Texas, which was before the Court, and the decisions and practice in other States, have been the subject of much investigation and discussion and your petitioner respectfully represents to the Court that such investigation and discussion have made it appear that the arguments on behalf of the de-

fendants and appellees herein to sustain the organization of the District and the validity and regularity of the tax voted to secure the payment of the bonds herein, were not adequately and fully presented.

Your petitioner further respectfully represents to the Court that the opinion herein indicates that this Court has reached the conclusion that by the action of individual property taxpayers, a special district was carved out to furnish credit to pay for specified improvements on designated roads; that the existence of the district, continuing during the term of the proposed bonds, will prevent the improvement of roads needed to serve the territory in which the plaintiffs' lands are situated; that the purpose is special and that the burdens sought to be imposed on appellants lands are special assessments for local improvements; whereas, your petitioner respectfully shows to this Court, that this construction is erroneous and contrary to the decisions of the Courts of the State of Texas and the recognized and accepted practice of the officials of said State in proceedings under the act. Your petitioner further respectfully shows that according to the accepted practice and according to the decisions of the State of Texas, roads are not designated as a part of the petition for the creation of a district and the issuance of bonds; that the designation of the roads is a matter within the discretion of the County Commissioners Court and such roads need not be designated otherwise than by directing of the expenditure of the moneys raised by the issuance of bonds; that such discretion may be exercised at such time and in such manner as the Commissioners Court deems best in the public interest; that the County Commissioners Court is

not deprived of discretion as to the boundaries of the District, but that it is its duty to enter an order fixing such boundaries and in so fixing the boundaries, it is obliged to conform to the law, including those decisions of this Court which say that no district can be formed so as to arbitrarily deprive a man of his property without due process of law.

Your petitioner also respectfully shows to this Court that in his opinion, it is within the discretion of the County Commissioners Court to fix such boundaries as it may deem proper and appropriate and if the petition before the Court does not apply to such boundaries, then the petition must either be amended or denied. Your petitioner further respectfully represents to this Court that a single issue of bonds does not exhaust the power and authority of the District; that it is within the power of the property taxpaying voters to present further and additional petitions proposing the issuance of additional bonds; that this course may be followed by successive petitions until securities have been issued to the ultimate limit of twenty-five per cent of the assessed value of the real property of the District, and the proceeds may be expended in the same manner on such roads as the Commissioners Court deems most to the public interest.

Your petitioner further respectfully shows to the Court that the petition in this case has not for its primary purpose the making of the improvements, but rather the raising of money by which improvements may be made; that the purpose of the act is to authorize counties, political subdivisions thereof and defined districts thereof, to borrow money and to lend their credit for public purposes; that the tax to be levied is a tax which is appropriate and

suitable for an issue of securities which are to be disposed of in open market; that such a tax is usually and generally a general *ad valorem* tax and is not a special assessment based upon a local improvement.

Your petitioner further respectfully shows to the Court that the obligations created by the issuance of bonds of defined districts must be met from the tax provided whether the improvements have been built or not; that the obligation constitutes a corporate debt which must be paid in any event, without regard to the benefit of the property owner; that the roads and highways which are to be improved form a part of the State and County system of highways; that the defined district as such, has no power and jurisdiction over the improvement thereof, but the proceeds of the bonds are to be paid over and delivered to the County Commissioners Court and are to be by it expended in the same manner as other moneys raised for the improvement of public highways, i. e., in the improvement of such highways within the district as best suits the interests of the community, and not in the improvement of highways for the purposes of benefitting any individual or set of individuals.

Your petitioner further respectfully shows that by the proceedings of the property taxpaying voters, the order of the County Commissioners Court defining the District, and calling the election, and the vote of the property taxpaying electors, a public or quasi-municipal corporation has been created with powers conferred thereon by statute of Texas; that such creation and grant of powers only raise questions under the laws of the State of Texas, and do not present any Federal question; that it is within the power of the State

of Texas to confer upon the corporation so created the power of general taxation *ad valorem* for highway purposes without any relation to the benefits; that such power has been so conferred; and the conferring of such power does not present any question under the Fourteenth Amendment to the Federal Constitution.

Your petitioner further represents that he believes that if the foregoing reasons had been properly and adequately presented to the Court, a decision holding said statute unconstitutional would not have been rendered, but on the contrary the validity of the statute would have been sustained.

WHEREFORE, your petitioner respectfully prays that a rehearing of the appeal herein be ordered, and in support of the prayer of this petition for such rehearing, he respectfully submits to the Court the following

ARGUMENT.

I.

The Court erred, we respectfully submit, in certain important particulars, in its construction of the purpose and effect of the Texas statutes.

In its opinion, this Court has indicated that a special district was created to furnish credit and pay for

(a) specified improvements;

(b) on designated roads wholly within the territory selected;

(c) that the district will cease to exist as a body corporate upon the payment of the bond debt.

(d) that the inclusion of the plaintiff's lands in the road district, makes it impossible until the last bonds mature, thirty years hence, to create another road district and raise money for the improvement of roads needed to serve the territory in which their lands are situated; or shortly stated, that the creation of this district and the issuing of its bonds will prevent the improvement of roads immediately adjoining the plaintiffs' real estate;

(e) that the Commissioners Court has no power to modify the petition, but must order a vote in a district of the choice of the petitioners;

(f) that the Commissioners Court *once for all* must make a levy on the taxable property of the district sufficient to pay the entire debt as it matures;

(g) that this is a local improvement territory and that the burdens are special assessments for local improvements.

We submit that the opinion of the Court is erroneous in each of these particulars.

Certain facts appear in the record and in the opinion of the Court which we desire to call to the attention of the Court.

There is no evidence of a "gerrymander". The opinion of the Court says that Road District No. 2 embraces approximately the northerly half of the County. It appears from the opinion of the Court below, probably from local knowledge or informal concession as the fact does not appear otherwise

from the record that the District includes the whole of two Commissioners Precincts. For the purpose of electing the County Commissioners, the County is divided into four Commissioners Precincts. The territory of the District is approximately eighteen miles north and south, and thirty miles across, extending from Archer City to the northerly boundary of the County. No evidence of gerrymander appears in its form; the substantial proportion of the county being more than one-half, or approximately 500 square miles, negatives the idea that its boundaries were fixed merely with the ulterior object of imposing taxes upon any particular property holders.

The roads to be constructed are public enterprises and not merely local. The Ozark Trail is a Federal aid road. The Southwest Trail is a State highway, being constructed with the aid of the State (Transcript, fol. 69). Parenthetically, it may be mentioned that the "Ozark" and the "Southwest" Trails are both main highways in a national sense. The "Ozark", we believe, begins at St. Louis, passes through Oklahoma and Texas to New Mexico, and thence on to California. The "Southwest" extends from the State of Oklahoma across Texas to Corsicana, Texas, on the Gulf coast. The other two roads connect important parts of the district with these important highways. Neither a Federal aid road, nor a State highway can be accurately described as "local improvement". They are public enterprises of the State and Nation, and are not constructed merely for the sake of giving access to or improving the lands of individual property owners.

The Act of Congress of November 9, 1921, Chapter 119, Section 6 (42 Stat. 213), defines the character of roads for which Federal aid may be given. The aid is given because they are "post" roads, the title of the act being:

> "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes."

In giving Federal aid, preference must be given

> "to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character."

The State, through its State Highway Department, must select or designate a system not to exceed seven per centum of the total highway mileage of the State. Upon this system all Federal aid apportionment shall be expended. The highways which receive Federal aid shall be divided into two classes, the first being known as "primary or interstate highways" and the second being "secondary and intercounty highways" "which shall connect or correlate" with the primary or interstate highways.

The Ozark Trail belongs to these classes. It is well known that it is intended as a transcontinental or interstate highway. It is scarcely possible to describe this highway as a local improvement constructed for special purposes.

By an act of 1917 (Acts 1917, p. 416), the State Highway Engineer is directed to prepare under the direction and with the approval of the State Highway Commission, a comprehensive plan, providing a system of State highways. By Section 2 of Chapter 186, General Acts, 1925 (p. 456), all highways

included in the plan as prepared by the State Highway Engineer pursuant to the statute cited, "are hereby designated as the State Highway System." By Section 3 of that Act, the County Commissioners Court of each County is authorized to aid the construction and maintenance of any section or sections of any highway constituting a part of the State Highway system and

> "any moneys in the available road fund of the County or any political subdivision or defined district thereof, may be appropriated for the purpose of granting such aid hereinafter designated as 'County Aid'."

By section 4 of the Act of 1925, no further improvement of the State Highway can be made under the direct control of the Commissioners Court of any County, unless and until the plans and specifications for the improvement have been approved by the State Highway Engineer.

It thus appears that both the Southwest Trail and the Ozark Trail have been designated by the State Highway Department for improvement as State Highways, for the first of which Federal aid has been obtained, and that the improvement of these highways has not been undertaken exclusively by the citizens of Road District No. 2. A contribution to the cost of the improvement by the State of these highways is all that the citizens of Road District No. 2 have undertaken. The enterprise is national in its character as well as State-wide in the case of both highways.

The tax on the plaintiffs' property is negligible. Plaintiffs' property consists of 24,900 acres. The assessed valuation thereof is $257,080. This rep-

resents an assessed value of approximately $10.33 for each acre of the plaintiffs' property. The tax levied for the first year is at the rate of 43 cents per $100 which on an assessed value of $10.33 per acre, equals 4.17 cents per acre. Bonds are to run for thirty years, and the total annual taxes payable by each individual acre during these thirty years on present assessment, will only aggregate $1.25. In other words, spread over a period of thirty years, the tax per acre is trivial and negligible. There is no element of hardship, oppression or confiscation.

The view of the Court is summed up in the following quotation from the opinion:

> "On the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt."

The contention of your petitioner is, that Article 3, section 52 of the Texas Constitution as amended in 1904, and the statutes, provide for the creation of incorporated general taxing districts, in which, by voluntary act of the resident property taxpaying voters, evidenced by a two-thirds vote, a general *ad valorem* property tax on all the taxable real and personal property in the district, as ascertained by the State and county assessment, may be levied to pay debts for public improvements of general benefit to the district as distinguished from the individual property owners.

This view is diametrically opposed to that expressed in the opinion of the Supreme Court, and

if correct, requires, we respectfully submit, a rehearing in this matter.

A. The Purpose of the Constitutional Amendment of 1904.

Prior to 1904, counties in Texas were afflicted by a tax limit which was not even sufficient for the upkeep of dirt roads and which would not permit of permanent improvements. With the advent of the automobile came a loud urging for more and better roads. The 1904 amendment to the Constitution, Art. III, sec. 52, was thereupon adopted to provide for bonds and taxes to construct five different kinds of improvements. Texas had two hundred and fifty counties, and it is one thousand miles across the State. The variety of purposes was brought about by physical and climatic conditions. The Gulf Coast needed reclamation; the Panhandle needed irrigation. The only all pervading need was highways. Roads were as universally wanted as school houses. And so the people provided a method of building roads by which counties, political subdivisions and defined districts might lend their credit and issue bonds payable from *ad valorem* taxes on all the taxable property in the county, subdivision or district. These roads are a part of the general State and County highway system. The taxes are levied on the same basis as all the other taxes for road purposes, namely, on both real and personal property.

In *Aransas County* v. *Coleman-Fulton Pasture Co.*, 108 Tex. 216, 191 S. W. Rep. 553, PHILLIPS, C.J., said (191 S. W., p. 555), that the amendment of 1904 to section 52 of Article 3, marked a radical departure from the previous policy of the State;

that it was the response to public demand that provision might be made whereby the State and each locality might be supplied *"through voluntary taxation"* with adequate, durable and permanent roadways. He added:

> "The former bounds of taxation for their construction and maintenance were set aside, and the political subdivisions named, in addition to all other debts, were, under legislative provision, given authority upon a requisite vote to issue bonds in the liberal amount of one-fourth of the assessed valuation of the real property of such districts. * * * Different units for the necessary taxation, and therefore different units as the beneficiaries of the taxation, from those theretofore existing, were thus authorized. It was plainly designed that the extent of the improvement should not be limited alone to the necessities of a county, nor was it to be longer dependent alone upon the powers of a county. The purpose of the amendment was a broad one, its scope was large, its spirit liberal."

In other words, in adopting the constitutional amendment, the people had taken into consideration the needs of the entire State and not the needs of the particular localities. It was intended to permit improvement wherever voluntary taxes might be levied. In the case cited, PHILLIPS, C.J., concludes:

> "In a word, the purpose of this amendment plainly was to provide the means of building and maintaining not alone neighborhood, precinct or even county roads, but adequate road systems throughout the entire State, to be availed of by larger or smaller areas as might be desired, so as to afford through the exercise of a liberal taxing power widely distrib-

> uted, adequate and continuous highways through every section of the State. Such a purpose stands out, boldly, we think, in the broad and sweeping provisions of the amendment."

This is a declaration by the highest court of Texas, that the purpose of the amendment and necessarily the purpose of the statute enacted to carry it into effect, are not limited to benefit to particular pieces of property in connection with a particular improvement, but that they are intended to operate upon the general highway system of the State for the benefit of the State as a whole, and of course, for the benefit of the territorial unit in which the highways are constructed, but not for the special and peculiar benefit of particular property owners therein.

For almost twenty years taxpaying electors have voted district road bonds, coupled with a levy of *ad valorem* taxes to pay them, and until the decision in this case, paid such *ad valorem* taxes to redeem their obligations. The Legislature has never yet sought to provide for the construction of rural highways by taxes of any nature, other than *ad valorem* taxes. In the rural districts no machinery exists for the construction of a highway on the basis of benefitting the property through which it runs. No machinery exists by which the benefit to the abutting property may be determined. No machinery exists by which a special assessment based upon benefits may be imposed, and the only highway system which exists in the rural districts of Texas, are those highways which form an integral part of the State and county highways.

The purpose of the act is not to create a means of improving *specified* highways within the district,

but to provide a means by which the property tax-paying voters may raise money by voluntarily taxing themselves for the purpose of constructing or aiding the construction of such highways within the district as the County Commissioners Court may, in its discretion, select.

(B). Designation of Highways not required.

There is no statute which, at any stage, requires the roads to be designated for the information of the voters. In constant practice, defined districts have been formed, bonds and taxes voted, and the bonds sold and issued, and the moneys turned over to the County Commissioners Court to be expended in its discretion on such roads as it may deem best.

That the regular practice under section 52 of Article 3 of the Constitution as amended, and the statute before the Court, is to designate the roads after the bonds have been voted, is shown by the decision of the Texas Supreme Court in *Limestone County* v. *Garrett* (Tex.), 236 S. W. Rep. 970. In that case, the Legislature, purporting to act under the express power conferred by section 9 of Article 8, passed a local law for Limestone County. The first section adopted the general law relating to the issuance of bonds of counties, political subdivisions and defined districts thereof. Section 5 provided for the creation of a Board of Permanent Road Commissioners for road districts voting bonds. *After the bonds had been voted,* a dispute arose between the Permanent Road Commissioners for Road District No. 15 of Limestone County, and the County Commissioners Court. The Court attempted to supersede the action of the Road Commissioners and designated other roads for the im-

provement. Thereupon, the Board of Permanent Road Commissioners sued to enjoin the County Commissioners Court from spending the money on any roads except such as were designated by the Board of Permanent Road Commissioners. The Court held that the Legislature could not by special act create officers for the Road District in violation of the provisions of section 56 of Article 3 of the Constitution prohibiting local or special laws "creating officers".

But no doubt was expressed as to the validity of the statute or the regularity of the election. This case illustrates the time when, according to the general practice, the roads are designated in applying the provisions of the law.

In *Black* v. *Strength*, 112 Tex. 188, 246 S. W. Rep. 79, in the case of county bonds issued under the same statute, the plaintiff sought to enjoin the expenditure of money for roads other than those designated by the County Commissioners in an order made *thirty days after the election was ordered*, but five days before the election. GREENWOOD, J., said that it was within the power of the Commissioners Court to designate by appropriate order passed at a regular session and entered on the minutes, what roads were to be improved with the proceeds of legally authorized bonds.

> "Not only is there nothing inconsistent between the order for the election and the subsequent order, but some such order as the latter was essential to attain the end which the election was designed to accomplish. That the order was made before the election conditioned on the bonds being voted, cannot be urged as a just ground of attack. * * * The court was not binding itself to a certain course of action in the future. It was instead making a pres-

> ent designation of highways to be improved with the proceeds of the bonds should same be voted, issued and sold."

This case clearly implies that the roads might have been designated by the County Commissioners Court after the election was held. The order before the court was made long after the election was ordered. This decision is inconsistent with the views expressed by the learned Justice in the present case that under the act, a defined district has been carved out

> "to furnish credit and to pay for specified improvements on designated roads."

In *Grayson County* v. *Harrell* (Tex. Civ. App.), 202 S. W. Rep. 160, a case which involved a post-election dispute as to the particular road upon which the proceeds of county bonds issued under the same statute should be expended and where the election order was silent as to the particular road and the plaintiffs relied on collateral and extraneous agreements not appearing of record on the minutes of the County Commissioners Court, the court said:

> "The power to provide for the improvement of public roads is a legislative function which has been delegated to the Commissioners' Court. This power is to be exercised for the *general good of the public, and not in the interests of any community or individual.* The court cannot delegate the exercise of this power and discretion to others, nor can it divest itself of such power by agreements in advance to exercise such discretion in any particular manner."

The *italics* are ours throughout this argument unless otherwise indicated.

In *Wright* v. *Allen* (Tex. Civ. App.), 257 S. W. 980, the Court held that pre-election orders made by the Commissioners Court as to the construction of roads out of proceeds of the voted bonds should be construed so as to reserve the right to make such changes in location as in the judgment of the County Commissioners Court, would be necessary, so long as the work as contemplated would be in substantial compliance with such pre-election orders.

Cannon v. *McComb*, 268 S. W., 999 (Writ of Error dismissed by Supreme Court for want of Jurisdiction) involved the construction of a road in Jack County out of the proceeds from the sale of County bonds voted and issued under this statute. The court held that since

> "discretion to expend the money derived from the sale of the road bonds was vested in the Commissioners Court by statute,"

in order to warrant the granting of an injunction to control their action, it was necessary that the complaint should contain specific allegations of all material and essential facts and the facts so alleged should be sufficiently certain to negative every reasonable inference arising from the facts stated from which it might be deduced that plaintiffs were not entitled to the relief sought.

The Texas Court of Civil Appeals in the case of *Adams* v. *Mullen*, 244 S. W. 1083, held that the order of the Commissioners Court declaring the result of a county road bond election, under this statute, and authorizing the issuance of such bonds for the construction of roads "within and for" the county, was not at variance with the notice of such bond election providing for the construction of

roads "throughout" the county, since, in any event, the Commissioners Court is left to exercise its sound discretion in its selection of the roads to be improved. The court said:

> "The use of the phrase, 'throughout the county', meant no more or less than the phrase subsequently used, 'within and for the county', and whether either of these phrases had been used, or not, the power was lodged in the commissioners' court, in the absence of a showing of a gross abuse of discretion, to devote the funds derived from the bond issue to the construction of the one paved highway in a 'direct line across the county' of which appellants complain. *Aransas County* v. *Pasture Co.*, 108 Tex. 216, 191 S. W. 553; *Grayson County* v. *Harrell* (Tex. Civ. App.), 202 S. W. 160, and authorities cited."

(C). *Boundaries of Defined Districts.*

Texas Revised Statutes, 1911, Art. 628, requires the petition of the resident property taxpaying voters. There is no requirement that the petition shall define the boundaries of the district, and districts have been formed where the boundaries were defined not in the petition, but by action of the County Commissioners Court irrespective of the petition entirely. Art. 628 does not prescribe what the petition shall contain. The election is ordered and the order must state the amount of bonds proposed, the rate of interest, the date of maturity, and under an amendment passed eight years after the statute was first enacted, the order and notice of election must also describe the boundaries of the District

> "as described and defined in the order of the County (Court) establishing such political subdivision or defined district of the county."

In *League* v. *Brazoria County Road District No. 13*, (Tex. Civ. App.), 187 S. W. Rep. 1012, the court said:

> "The determination of the area of the district, the sufficiency of the petition, and other prerequisites to the establishment of a valid road district was a matter peculiarly committed to the commissioners' court, and the motives of the persons who set the machinery in motion leading to the creation of the district cannot control nor be taken into consideration."

This case was decided in 1916, prior to the amendment of 1917, which required the order and notice calling the election to describe and define the boundaries of the District as they are described and defined in the order of the County Commissioners Court establishing such district. (Art. 628). The decision consequently shows that independently of the amendment, it has always been the rule that the bounds of the district are peculiarly a matter for the determination of the County Commissioners Court.

The organization of a district which is a palpable gerrymander, and the boundaries of which are formed for the purpose of subjecting some property owner to unreasonable taxation, is against the law.

> *Gast Realty & Investment Co.* v. *Schneider Granite Co.*, 240 U. S. 55;
> *Kansas City Southern Ry.* v. *Road Imp. Dist. No. 6*, 256 U. S. 658;
> *Kansas City Southern Ry.* v. *Road Dist.*, 266 U. S. 379.

Consequently, if this district was petitioned for with the purpose of taxing the plaintiff's

property the County Commissioners Court was not bound to enter an order defining it, but it was its duty to obey the law and to refuse to enter such an order.

This is sufficient to show that the County Commissioners Court was not, in this case, or in any other case which might come before it, controlled by the boundaries stated in a petition by the property taxpaying voters, and if this district was unreasonably laid out, was not obliged to define its boundaries or to order the election.

In support of their contention that the Commissioners Court was obliged to lay out a district with boundaries conforming to the petition, the appellants cited in their brief the cases of *Huggins* v. *Vaden*, 253 S. W. 877, 259 S. W. 204 (1923), and *Meurer* v. *Hooper*, 271 S. W. 172. We have been unable to find in these cases anything which says that the Court was obliged to accept the boundaries. We grant that a mandatory duty lay on the Court to act, but the statute does not control the manner in which the Commissioners Court must act, nor do the cases cited say that its action is controlled by the terms of the petition.

In *Huggins* v. *Vaden, supra,* two petitions were presented, the petition for Road District No. 2, being presented before the petition for Road District No. 5. The territory defined for District No. 5, embraced part of District No. 2. The Court chose to act upon petition for District No. 2 first and refused to act on District No. 5 unless the boundaries were changed by amendment. The case recognized that there was some degree of discretion. There was no suggestion at any place, that it was not within the power of the County Commissioners Court to entertain an amended petition.

Similarly, in *Meurer* v. *Hooper, supra,* two petitions were presented, one for Road District No. 1, which included a part of Road District No. 2; the other for Road District No. 2. The petition for Road District No. 1 was first presented. Attorneys claiming to represent the petitioners, asked to amend it in material respects. This request was denied because there was no sufficient evidence of their authority to make the change. On the same day, the Court ordered an election to be held in District No. 2. The whole argument of the Court in its opinion is on the basis that the Commissioners Court had a discretion as to which District might be first formed and what the boundaries should be of the defined territory, or whether both might not be formed by changing the boundaries of District No. 2, to avoid overlapping districts. In other words that the whole matter was within the discretion of the Commissioners.

These decisions have been cited by the plaintiffs and appellants herein. We respectfully submit that they are not authority for the propositions stated in plaintiff's brief.

Moore v. *County Commissioners Court of Bell County* (Tex. Civ. App.), 175 S. W. 849, also cited by plaintiffs, involved an issue of county bonds, and did not bring in question the defining of a district. The language used was only by way of discussion and illustration and does not support the idea that if the district described in the petition is arbitrary and unreasonable, or against the interests of the County, it must nevertheless be accepted by the County Court.

We concede it was the mandatory duty of the County Commissioners Court to act upon the petition when presented, but that mandatory duty did

not control the manner in which it should so act. The Court might have denied the petition to define the boundaries. It might have changed the boundaries. It might in our view, have selected entirely different boundaries, with the result that the question would be presented whether there was any petition before the Court which applied to the territory as defined by the Court. According to our reading of *Huggins* v. *Vaden, supra,* and *Meurer* v. *Hooper, supra,* these views are not inconsistent with the rulings of the Court in these cases.

The Constitutional amendment and the statute should be liberally construed and applied. They were adopted to meet the needs of a rural population which from the inception of the State, had been accustomed to govern itself. The petition was not presented and acted upon secretly and without previous discussion. It had been talked over for months before (Tr., fols. 70, 74). Competing petitions were presented and evidently the whole dispute grows out of the failure of the plaintiff,s who also petitioned for Road District No. 1, to impose on the Commissioners Court their wishes and to bring about the defining of a district such as they desired.

In most cases, defined districts are created and the election ordered without contest, and the district asked for in the petition is the only district before the Court. In the absence of anything arbitrary and unreasonable, the Court naturally orders the creation of the District with the boundaries as defined in the petition. Although it is mandatory upon the Court to act upon a petition, and although in a great majority of cases, the petition defines boundaries which are acceptable to the community, it does not follow that the Commissioners Court is

obliged in every case to accept the boundaries proposed. The idea that the Court must accept the boundaries disclosed in the present case may have sprung from the fact that some action is mandatory and usually the District proposed is accepted by the Commissioners' Court without question, but a mistake of the law in a particular case is no ground for holding the statute unconstitutional, nor is it ground for setting aside the action of the Court, if after all the Court acted for the best interests of the County and District. We respectfully submit that the natural presumption must attach that, as the Commissioners' Court has the duty to define the boundaries of the District, it is its duty to adopt such boundaries only as are in the public interests.

(*D*). *Application of the Proceeds.*

After the bonds have been voted, they are required to be submitted to the examination and approval of the Attorney General and registered by the State Comptroller

> "and the purchase money therefor shall be placed in the County treasury of such County to the credit of the available road fund of such county or of such political subdivision or defined district of such county, as the case may be * * * Such funds shall be paid out by the County Treasurer upon warrants drawn * * * upon certified accounts approved by the Commissioners Court of the County when such funds belong to the entire County; and when such funds belong to a political subdivision or defined district of the County, they shall be paid out by the County Treasurer upon warrants issued by the County Clerk upon certified accounts of the Road Superintendent of such Road District and approved by the Commissioners Court of the County." (Art. 632.)

The statute no where limits the authority and discretion of the County Commissioners Court as to the expenditure of the proceeds. The County Commissioner in whose Commissioner's Precinct the political subdivision or defined district is located, is *ex officio* Road Superintendent of the Road District with power to contract for and on behalf of the Road District, provided such contract shall not exceed $50., and

> "all contracts exceeding the sum of $50., shall be awarded by the entire Court, which contract shall be binding on said County, political subdivision or defined district." (Art. 639.)

The proceeds of the bonds do not constitute a trust fund for road construction only. A creditor recovering damages for breach of contract may compel payment of his damages therefrom. See *Horn* v. *Matagorda Co.*, (Tex.), 213 S. W. Rep. 934, (Commission of Appeal sitting as a branch of the Supreme Court). In that case, it was said:

> "It may be true that to hold the fund derived from a sale of bonds subject to recoveries for breach of contract might in some instances result in a dissipation of the fund without accomplishing the purposes for which it was raised. Such dissipation might also result from unwise or improvident expenditure of the fund. But these possible results are *risks assumed by the taxpayers* when they accept the benefits of the statute by voting the tax. Their remedy in a proper case is against the officers the law designates to act for the district. The possibility of such results is no answer to the legal claims of those who have contracted upon the faith of the statute with the officers clearly authorized to bind the district and its funds."

In 1925, Art. 637, of the Texas Revised Civil Statutes, 1911, was amended so as to authorize the levy of taxes by the District to pay any judgments rendered against it (Gen. Acts, 1925, Ch. 132, p. 334). The tax so authorized is of the same nature as the tax to pay the bonds; no distinction is made; yet it must have been a general tax independently of benefit, for it is for the purpose of satisfying a corporate liability.

In *Road District No. 4* v. *Home Bank & Trust Co.*, 5 Fed. (2d) 625, it was held that the District is liable for the amount of bonds, although they were unlawfully sold and the original purchaser not only dishonestly acquired possession of the bonds, but appropriated the proceeds.

In other words, this decision necessarily held that the bonds represented a debt of a corporate entity, and that the tax *ad valorem* on all the taxable property was not levied as a trust fund to construct roads, but as a fund for the payment of a debt.

(*E*). *The Character of the Tax.*

The statute requires that a tax sufficient to pay the interest and to produce a sinking fund for the bonds shall be levied "before said bonds shall be put on the market" (Art. 634). The tax, if for a political subdivision or other defined district, is to be assessed and collected

> "as is now provided by law for the assessment and collection of common school district special local taxes".

In other words, the common school district taxes which are voted by the qualified property taxpaying

voters pursuant to authority conferred by section 3, Art. 7 of the Constitution and which are levied upon the real and personal property in the School District in the same manner as other State and county taxes, for the purpose of raising funds for the ordinary maintenance and operation, as well as for the building of school houses.

In the nature of things, this tax involves an annual extension on the tax rolls according to the value as it may fluctuate from year to year.

In the case of *Road District No. 2 of Archer County,* the bonds have been ordered to be issued as serial bonds extending over thirty years, the maximum term mentioned in the submission, involving thirty payments of the principal. In other words, an instalment of the principal ranging from $5,000 per year in the earlier years to $18,000 in the last years of the thirty year term, will be paid in each year. In each year, to comply with the statute, a levy must be made for the annual interest and for the next instalment of the principal, that is to say, in the first year, on bonds bearing interest at five and one-half per centum per annum, the maximum permitted under the statute, the interest will be $17,500. The first instalment of the principal will be $5,000, making a total levy of $22,500. The next year's interest will be reduced $275. and the interest in each successive year will be reduced correspondingly, until the whole debt would be paid. The result will be, that in the last half of the term of thirty years over which the bonds run, not only will the amount of principal be very materially reduced, but the annual payments of the interest will be cut in two.

(*F*). *Successive Elections for Future Improvements.*

We have pointed out above, that from year to year as the bonds mature, the amount levied in each year would be reduced. The principal debt would also be reduced, making available an increased margin of indebtedness, so far as this issue is concerned, as the years go by. In addition, presumably the taxable value of the real property in the District would increase, thereby further increasing the margin within which debt for road purposes may be created.

The power conferred upon the District by the statute to lend its credit and issue bonds permits it to hold successive elections to vote bonds for road purposes, so long as the necessary petitioners can be found; and bonds may be voted and issued until the constitutional limitation of twenty-five per cent of the assessed value of the real property has been reached for all the purposes mentioned in section 52 of Article 3.

Plaintiffs and their friends may sign a petition complying with the statute calling for a further issue of bonds by District No. 2, and the proceeds may then, in the discretion of the County Commissioners Court, be used to improve the highway through or immediately adjacent to the lands of the plaintiffs. This process may be continued until every foot of existing highway has been improved. It may also be continued for the construction of new highways, until all the road in the district have been put in the most perfect condition, and every person has been given a road of the most improved nature immediately adjacent to his property. The only limitation is, that the bonds of the

successive issues shall not exceed the limitation prescribed by the Constitution.

Under these circumstances, we respectfully submit that the district was not carved out to furnish credit and to pay for providing improvements on designated roads wholly within the territory selected. We submit that purpose was not special. We submit that the District will not cease to exist as a body corporate upon the payment of the bonded debt involved in the proceedings. We also submit that the inclusion of the plaintiff's lands in the road district, does not make it impossible, until the last bonds mature thirty years hence, to raise money for the improvement of roads needed to serve the territory in which plaintiff's lands are situated. It is not necessary to create another district for that purpose. This district can raise the money under the Constitution and statutes of Texas for the construction and improvement of every kind of highway that its taxpaying property owners may care to issue bonds for.

There is no statute of Texas which terminates the existence of the District as a "defined" territory under the Constitution and Statutes, and we are unable to discover any basis in either for the view that on the payment of the debt the District will cease to exist as a body corporate, or that the organization of the District will prevent other and additional improvements.

Sometimes, as in the present case, an order is adopted by the County Commissioners Court specifying the roads to be improved with the proceeds of the particular issue, before the election is held. This is done as an electioneering step, to advise the property taxpayers how their money is to be expended. Good faith will compel the County Com-

missioners Court to carry out the pre-election promises which it has made, but these promises were not made because of anything in the statute, but only because sometimes the property owners before voting the money *demand* to know how it will be expended.

In the present case, neither the petition, nor the order defining the District, nor the order of election, nor the notice of election, designated any particular roads. The order specifying the roads made in the present case does not recite any petition therefor, but merely that the petitioners and the public generally desired the roads named.

In the present case, the transcript record discloses the reason for the formation of the District. The northerly and the southerly halves of Archer County were split wide apart in their demand for highways. Each wanted all the improved highways to be within its own limits. In the practical application of the Texas Constitution and the Road District Act, a means is presented by which half can improve the highways, that is, provided each half will lend its credit to the borrowing of money by a vote of two-thirds of the resident property taxpaying voters.

The means which is offered is simply a means by which, in keeping with the American genius, the inhabitants of the territory may progress and furnish the public by voluntary taxation, with the conveniences and comforts of modern civilization, although their neighbors across the fence may refuse to see that an improved concrete highway is a general public advantage, as against a dirt track in which, in times of rain, wheels will sink to the hub.

II.

The Legislature of the State of Texas has conferred upon the road districts general powers of taxation to provide for the payment of bonded debt incurred for general road construction purposes.

The opinion of the Court in the present case says that

> "The proceedings in this case cannot be sustained as the levy of a general tax."

This statement is contrary to the view which has heretofore been generally accepted in Texas and we respectfully submit cannot be sustained in view of the terms and purposes of the statute.

It is significant that the Constitutional amendment of 1904 was by way of addendum to that provision of the Texas Constitution which prohibited the Legislature from authorizing any county, city, town or other political subdivision of the State to lend its credit or to grant public aid, or thing of value, in aid of or to any individual, association or corporation. In other words, the Article as originally framed, dealt with the financial affairs of the municipalities and subdivisions. As originally framed, it was a prohibition against the incurring of debt. The amendment of 1904 added a rider or qualification to this prohibition stating terms and conditions under which counties, political subdivisions and defined districts might lend their credit and borrow money for certain public purposes. In other words, the primary purpose was

to enlarge the powers of these bodies to raise money. The money so to be raised was to be raised in the financial markets, and it was to be raised by the issuance of securities which were to be supported by

> "such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof, as the Legislature may authorize."

Upon other questions, the Supreme Court of the United States has held that the character of the security to be issued, viz: a security to be sold in the financial markets must be taken into consideration in construing the powers conferred.

In *United States* v. *Clark County*, 96 U. S. 211, where the Court held that a special tax of one twentieth of one per cent was not the limit of taxation for the bonds involved, but that they were the general obligation of the County and payable from a sufficient tax, it supported this determination by the declaration that

> "We cannot think the Legislature proposed rendering the bonds unsaleable or almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the objects sought to be secured by giving authority for their issue."

In *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, this Court sustained recitals that the total amount of the issue did not exceed the limit prescribed by the Constitution of the State. Mr. Justice HARLAN, at page 275, said, that it was insisted that the Court's decision rendered it impossible for a State by constitutional provision to guard against excessive municipal indebtedness.

He said that that result by no means followed; that the State Constitution might prescribe a definite rule or test for determining whether that limit had already been exceeded, and in that event all who purchased bonds would be subject to that rule or test whatever might be the hardship upon *bona fide* purchasers. He also pointed out that it was competent for a State to declare that its securities should at all times be subject to contest. Then he added:

> "But for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Similarly, in *Denver* v. *Home Savings Bank*, 236 U. S. 101, a case which involved the negotiable character of certificates of indebtedness, Mr. Justice HOLMES, at pages 104 and 105, pointed out

> "The power to issue certificates of indebtedness or bonds is given in terms, and it is contemplated that these instruments may be sold to raise money for the purpose named."

So, in the present case, when the Constitution and statute authorize counties, political subdivisions and defined districts

> "to issue bonds or otherwise lend their credit and levy and collect such taxes to pay the interest thereon and provide a sinking fund for the redemption thereof"

both the statute and the Constitution contemplated a negotiable security to be sold in the financial markets supported by a general *ad valorem* tax on the taxable property in the District, for such a

tax is the usual security behind negotiable municipal bonds.

The constitutional amendment of 1904 was passed to enable defined districts, as well as political subdivisions and counties, to raise money for highway purposes, among others. The power to construct the highways previously existed, but as pointed out above, the counties were hampered by the inadequacy of the tax, and it was necessary to confer additional powers to lend their credit and borrow money. This was authorized by the amendment to section 52, of Article 3.

Hence, the questions involved in this case should not be approached from the narrow perspective that what the statute authorized and the constitutional amendment contemplated, was simply a specific local improvement. The intent of the Constitution and of the statute, was to furnish a means by which the property taxpaying voters of the County, political subdivisions and districts might voluntarily lend their credit, borrow money and vote the taxes. By Section 3 of Article 6 of the Texas Constitution, and by the general practice adopted in Texas (Chapter 2, Title 18, Revised Statutes 1911), the property taxpaying voters alone vote on the question of creating debt.

The purpose of the amendment is persuasive as to the nature of the tax which was contemplated by the Constitution. It was the same kind of tax that was authorized for other securities. Accordingly, section 633, Texas Revised Statutes 1911, declared that the general laws of Texas relative to county bonds, not in conflict with the particular provisions of the Act of 1909, shall apply to the issuance, approval, registration, sale and payment of county and highway district bonds, provided for

by the Act of 1909, placing these bonds on the same basis as to issuance and payment as regular county obligations.

The Texas Constitution defines and limits the power of general taxation. Article 8, section 1, requires

> "all taxation shall be equal and uniform. All property in this State * * * shall be taxed in proportion to its value which shall be ascertained as may be provided by law."

Section 9 of Article 8 of the Constitution regulates the rate of State and municipal taxation

> "except as in this Constitution otherwise provided."

Section 5 of Article 11, as amended, authorizes cities of 5,000 inhabitants to collect such taxes as may be authorized by law or their charter, not exceeding two and one-half per cent, and prohibits the creation of debt by such cities, unless provision be made to assess and collect annually a sufficient sum to pay the interest and create a sinking fund.

Section 4 of Article 11, as amended in 1920, regulates the *taxes* which may be collected by cities and towns having a population of 5,000 or less.

Section 6 of Article 11, authorizes counties, cities and towns to assess and collect the *taxes* necessary to pay the interest and principal of the debt existing at the time of the adoption of the Constitution.

Section 7 of Article 11, prohibits the creation of any debt by any city or county, unless provision is made at the time for levying and collecting *"a sufficient tax"* for the principal and interest.

Section 7 of Article 11, also authorizes the counties and cities on the Gulf Coast to construct sea

walls and to levy and collect such *tax* for sea walls, breakwaters and sanitary purposes, as may be authorized by law, and the creation of debt for such works.

The same word "tax" or "taxes" is used in all these provisions. The tax which is authorized in the case of counties, political subdivisions and defined districts by the provisions of section 52 of Article 3, as amended, does not differ in nature and kind from the taxes referred to in the other provisions of the Constitution. Under section 52 of Article 3, as amended, the tax is levied for the same purposes as in many of the other provisions, viz.: it is a tax to pay the debts of defined district; and so far as the Constitution of Texas is concerned, it stands on the same basis as taxes for that purpose referred to in the various provisions of the Constitution in relation to making provision for the payment of the debts and obligations of counties, cities and towns. When the Legislature proposed, and the people of the State of Texas voted, the amendment to the Constitution in 1904, is it not to be presumed that they intended to authorize and did authorize the same kind of tax as they had previously authorized for the debts and obligations of counties, cities and towns?

Section 52 of Article 3 of the Constitution, as amended, and the statute authorizing the issuance of bonds by road districts, has many times been before the Supreme Court of Texas. The Supreme Court has uniformly treated and held the provisions of the Road District Act to be valid and binding. There has never been a suggestion by it that it is open to any attack whatever.

The Supreme Court of Texas has sustained the constitutionality of the statute in *Simmons* v.

Lightfoot, 105 Tex. 212, 146 S. W. 871. Road District No. 4 of Liberty County had been organized and the Supreme Court of Texas issued a writ of mandamus to compel the Attorney General to approve its road bonds.

In *Munson* v. *Looney,* 107 Tex. 263, it was contended that taxes levied in payment of road district bonds, were ordinary taxes subject to the restrictions of the Constitution as to equality. The following propositions were submitted by respondent:

> 1. "The requirements of equality and uniformity of taxation control the tax that must be levied to take care of the interest and sinking fund of the bonds * * *." (Id. p. 265)
>
> 2. "It has been expressly held by our courts that the taxes levied by drainage districts to take care of the interest and sinking fund on bonds issued under the provisions of section 52 of Article 3 of the Constitution and the drainage statute enacted thereunder, are not in any sense 'special assessments' but are ordinary taxation, to which the restrictions of the Constitution as to equality, etc., apply. * * *" (Id.)
>
> 3: "In order for taxes to be 'equal and uniform' as required by the Constitution, two things are absolutely necessary—(1) Tax on two similar kinds of property must be equal and uniform. (2) The assessment and taxation must be equal and uniform throughout the taxing district. * * *" (Id.)

The court did not expressly rule on the question of the tax being a "special assessment," but saw proper

> "to strip this case of all of its complications and misleading propositions, so as to make clear and unquestionable the proper course to be pursued in issuing such bonds," (Id. p. 266)

and held in substance that the tax for an issue of road district bonds must be uniform throughout the district, and on that basis that the bonds in question could not be issued in view of the limitations imposed by section 52, of Article 3.

This view of the court was properly taken by reason of the fact that it had refused writs of error in *Harris County Drainage Dist.* v. *Parker,* 148 S. W. 351, and *Wharton Co. Drainage Dist.* v. *Higbee,* 149 S. W. 385, and which cases held that drainage taxes under section 52, Article 3, are not "special assessments." In the concurring opinion in *Munson* v. *Looney, supra,* it was expressly declared by HAWKINS, J. that the provisions of section 1 of Article 8 of the Constitution, which declare that "taxation shall be equal and uniform," apply

> "to each and every district within the purview of said section 52, including drainage districts and road districts"

(*Munson* v. *Looney, supra,* pp. 270, 271). It will thus be seen that for more than ten years, the Supreme Court of Texas has held taxes in defined road districts are "taxes" as that term is generally used and understood.

In *Robbins* v. *Limestone County* (Tex.), 268 S. W. Rep. 915, (1925), the case related to the power of the Legislature to bring county and road district roads under the control of the State Highway Department. The Supreme Court quoted the provisions of section 52 of Article 3 of the Constitution as amended, recognized the power of the County and the District to improve the roads in the County and District, declared that the moneys received for that purpose might

> "not be diverted to other purposes than those for which they were voted"

that is, for the improvement of the roads in the County or in the District, but otherwise treated both sections 52 of Article 3 of the Constitution, and the statute authorizing road district bonds, as a valid and integral part of the State Highway administration.

In *Horn* v. *Matagorda County* (Tex.), 213 S. W. 934, the Commission of Appeals of the Supreme Court held that road district funds may be applied in payment of damages for breach of contract. The judgment appealed from directed that a proper warrant be issued and delivered to the plaintiff to be paid out of the proceeds arising from the sale of road bonds issued and sold by the road district.

In *American Surety Co.* v. *Hill County,* (Tex.), 267 S. W. 265, the Commission of Appeals of Texas sustained a judgment against the person to whom the district road bonds were delivered and his surety for damages for the conversion of the bonds.

Bell County v. *Hines, Director General,* 219 S. W. 556, (Writ of Error refused by Supreme Court), did not involve a navigation district as indicated in appellants brief, but did involve only one question, namely: Whether or not the tax levied by the Commissioners Court of Bell County, for the purpose of paying the principal and interest of county road bonds *issued under this statute,* was a county tax or a road improvement district tax. It was contended by the Director General that the tax was the tax of a road district having the same boundaries as Bell County and not of the County as such, and therefore the intangible assets and rolling stock of the railroad company were not liable therefor. The Court held that counties had the right to levy taxes within the limits prescribed

by the Constitution, for county purposes, prior to the 1904 amendment to Section 52, Article 3 of the Constitution; that the construction and maintenance of public roads within a county is a county purpose; that by reason of the amendment to section 52, Article 3, *the limitation as to the amount of taxes that could be levied for road purposes was removed as to counties;* and that the taxes levied in payment of the road bonds, being a county tax, had the same dignity as other county taxes, and therefore, the properties of the railroad were liable.

The opinion of this Court in the present case says that

> "The proceedings in this case cannot be sustained as the levy of a general tax. The Commissioners' Court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Article 2242; Constitution, Art. VIII, sec. 9. The expenditure of the moneys so raised is not limited to any specified roads."

This suggests that the Court is of the opinion that the only general tax which County Commissioners' Courts may levy, is that authorized by Article 8, section 9, of the Constitution, being a tax of fifteen cents on the $100 for roads and bridges, and an additional *ad valorem* tax of fifteen cents on the $100 for public roads when voted by a majority of the electors. This is not the view of the Texas Courts. As pointed out above, by PHILLIPS, C. J., in *Aransas County* v. *Coleman-Fulton Pasture Co., supra,* the reason for the adoption of the amendment to section 52 of Article 3 of 1904 was the necessity of enlarging the credit of Counties and districts by superseding the tax

limits of Article 8, section 9. The Courts of Texas have repeatedly held that the 1904 amendment to section 52 of Article 3, conferred upon counties the right to vote road bonds and levy taxes therefor in addition to the taxing power authorized by section 9 of Article 8.

See, *Bell County* v. *Hines,* 219 S. W. 556, *supra.*

In *Fleming-Stitzer Road Building Co.* v. *Chastain,* 241 S. W. 619, the Court said:

> "By a well-recognized canon of construction if two provisions of the Constitution or two articles of the statutes can reasonably be so construed as to leave both of them effective, such construction should be adopted. It appears plain to us that article 8, section 9, of the Constitution, and the acts of the Legislature under title 18, c. 1, Revised Statutes, are limited to bond elections required to be carried by only a majority vote of the qualified taxpaying voters; while article 3, sec. 52, of the Constitution, and title 18, c. 2, of the statutes, has reference to bond elections required to be carried by a two-thirds vote. This construction permits both articles and the statutes thereunder to stand without conflict."

If the decisions of Texas be carefully scanned, we do not believe that a single remark can be found which countenances the belief that under the provisions of section 52 of Article 3 of the Constitution, as amended, and the legislation to carry it into effect, the special and peculiar benefit to the property immediately adjoining the highway can legitimately be considered in the expenditure of moneys raised by this means.

It must always be clearly kept in view that the debt is created to raise money to construct or improve rural highways forming a part of the general highway system of the State. The tax for this purpose has not usually been levied on the basis of benefit. Benefit assessments for this purpose are the exception, and not the rule. In this respect they differ materially from taxes for irrigation or drainage or other enterprises which involve the direct improvement of real estate in private ownership. In the case of irrigation districts, water is brought to lands in private ownership. In the case of drainage, water is taken from lands in private ownership. The principal benefit attaches to the land. The public benefit is only incidental and flows from the operation of the works on lands in private ownership. It is merely because the public safety, health or welfare is promoted by the improvement of lands in private ownership, that a public purpose attaches to irrigation or drainage enterprises.

So too, in the case of streets in cities. The benefit to the abutting property is immediate and probably constitutes the major benefit. Streets must be opened before sewers, water mains and gas mains can be laid. Sewers, water and gas mains are primarily for the benefit of abutting property. The opening of the street renders it possible to improve the abutting property by the erection of buildings. Here again, a special assessment is the frequent, if not the usual method of raising the cost.

But an entirely different situation exists in the case of rural highways. The abutting property owner usually gains no advantage, except an improved facility of travel. It is merely because he can reach the highway quicker than those who are

not on it that the greater benefit accrues to him. This is simply the same kind of benefit, though differing in degree, which accrues to all who may have occasion to use the highway. Hence, in this country, rural highways have usually been constructed by an *ad valorem* tax and the levy has been laid irrespective of benefits.

It is not to be wondered, therefore, that in dealing with the tax which is levied by road districts for the purpose of paying debts created to improve the State highways, the Texas Courts have regarded these taxes as levied entirely irrespective of benefits.

The cases cited by the plaintiffs and appellants in this action in their brief on the appeal, are not properly applicable, and do not constitute any authority as to the construction to be placed upon the statute authorizing the issuance of road district bonds. The first case cited is *Dallas County Levee Dist.* v. *Looney,* 109 Tex. 326, 207 S. W. 310. This was a case of a Levee District which had taken advantage of what is known as "The Canales Act",—a statute passed to carry into effect the so-called Conservation Amendment to the Constitution of Texas (Art. 16, Sec. 59). That constitutional amendment provides for taxes "equitably distributed" and it was this language which was construed to mean and possibly to require a distribution upon the basis of benefit. It is apparent that this is very different language from that used in Section 52 of Article 3 of the Constitution as amended, and in the statute before the Court in the present case, where the only word used is "taxes."

The second case cited, is *Texas & P. R. Co.* v. *Ward County Irrigation Dist.,* 112 Tex. 593, 251 S. W. 212. That case involved an irrigation dis-

trict. Elsewhere in this brief we point out that in the case of irrigation districts, the benefit is conferred directly upon the lands irrigated, and the public benefit is only incident to the improvement of these lands. In other words, in the case of irrigation projects, a special assessment for benefits would seem to be the natural and appropriate method of raising the money. The irrigation district was organized under the Irrigation Act of 1913 (General Laws, 1913, Ch. 172, p. 380). That statute requires a petition setting forth the necessity, public utility and feasibility, the proposed boundaries, and designating a name. A hearing is had upon the petition, and if at the hearing (Sec. 3), it appears to the satisfaction of the Court that the organization of the District, the construction or purchase of the plant specified in the petition, is feasible, that it would be a public benefit

> "and a benefit to the lands included in the district",

then the Court should so find.

Plaintiffs and appellants herein have quoted from the opinion in this case. But the quotations do not, we respectfully submit, present a fair view of the opinion. For example, the Court said:

> "It will be observed that the amendment of 1904 (to sec. 52 of Article 3 of the Constitution) confers upon the Legislature ample authority to create taxing districts for the purpose of promoting irrigation, and the enabling statutes have provided a system for the establishment, government, and support of such districts, under which, when formed, they are taxing districts to all intents and purposes, not essentially different from counties, cities,

> or other municipal corporations within the general powers and purposes for which they are created."

This declaration implies that the Court was of the opinion that the Districts might be authorized to levy taxes for governmental purposes, and not merely because of benefit. It is, however, to be noted that in other parts of the opinion the Court discussed the terms of the statute, recognized the fact that the statute was based upon benefits, although according to the opinion of the Court it need not have been so based, and the Court limited the language which it used to the terms of the statute then before it, saying:

> "Treating the law, therefore, as creating a tax for local improvements, to which must be applied the doctrine of special benefit to the property taxed"

etc., etc.

The decision thus amouts to no more than a simple holding that inasmuch as the statute required the benefits to be taken into consideration, every requirement of the law was satisfied.

Our reading of this case is that it indicates that the Supreme Court of Texas was of the opinion that whether the tax should be a general tax without regard to benefits, or a tax based upon benefits, was a matter for the Legislature to determine, and having determined that it should be a tax based upon benefits, the statute was valid.

This is a very different situation from the present case, where the Legislature has simply authorized a "tax" for the purpose of paying the debts and obligations of a public or quasi-municipal corporation, which debts were incurred for a purpose which is usually treated as governmental and not as a matter of special and peculiar benefit to the property owners.

III.

Road district taxes levied *ad valorem* on all the real and personal property in the district, according to the assessment for State and County purposes, have uniformly been held by the Courts of last resort in States other than Texas, to be general taxes.

The rule which obtains in Texas, is not unique. It is the same rule that is followed in other States. We believe we do not misstate the effect of the decisions when we say that we know of no case in the Court of last resort of any State, which holds that a road district tax, levied *ad valorem*, on all the taxable property, real and personal, within the district according to the assessment for State and county purposes, is a special assessment, and is not a general tax. On the contrary, they uniformly hold that such a tax is a general tax of the same character and nature as a State and county or general city tax, i. e., it is a tax not levied because of special and local benefits, but because the construction and maintenance of highways is a governmental function and duty, and the tax is levied in the performance of governmental power.

We submit that the following elements distinguish the impost in the present case from a special assessment and clearly show that it is a general tax:

(a) It is not for "specified improvements". On the contrary, it is to pay the debts of a public or quasi-municipal corporation.

(b) The statute does not require that the roads to be improved be designated before the bonds and tax are voted. On the contrary, as we have shown, this is merely done, if done at all, for the information of the voters, and the designation whether before or after the election, is within the discretion of the County Commissioners Court.

(c) The same public or quasi-municipal corporation may vote additional bonds and taxes. The liability for the additional bonds so voted is exactly the same as for the first. The taxes for the subsequent issues rank *pari passu* with the tax for the first issue.

(d) The Commissioners Court is not obliged to accept a district described in the petition, if it does not conform to the law or to the decisions of this Court.

(e) The levy that is made is not *once for all,* but is a succession of annual levies to pay the principal and interest of a debt.

(f) The improvements in the present case are two State highways and two County highways. They are not local improvements in any sense. The district is aiding in the immediate construction of needed means of travel for the benefit of the community as such, and not to improve any particular property.

These elements distinguish the tax in the present case from a special assessment. The text books use language which clearly shows that the views we urge are correct.

> "The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special as-

sessment cannot (at least in most states) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality. The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefited is a special assessment rather than a tax notwithstanding the statute calls it a tax."

Cooley on Taxation (4th Ed.), Vol. 1, sec. 31, page 106.

Applying the first distinction of Judge Cooley, the tax in the present case is not levied solely upon land. On the contrary, the statute provides that it shall be assessed and collected in the same manner as other road taxes if for a county, and if for a political subdivision or other defined district, in the same manner as is provided for the assessment and collection of common school district taxes. Both of these taxes are on personal property as well as on real property.

Applying the second of Judge Cooley's distinctions the personal liability imposed is precisely the same as the personal liability in the case of general taxes, i.e., in the case of the general county road tax and in the case of the common school district tax.

Judge Cooley's third distinction that a special assessment is based wholly on benefits, necessarily implies that some machinery must be provided for a determination of the benefits when an act purports to authorize the levy of a special assessment.

If the power to determine the benefits to such lands is delegated to an agency of the State or Legislature, such agency acts in a judicial capacity, making a judicial determination of the benefits. This necessarily involves a notice and a hearing. A body levying a general tax does *not* act in a judicial capacity, but as a representative of the sovereign State. No question of benefit from the tax is involved. There is no element in the levy of such a tax which requires any finding of fact or a judicial determination of any character whatsoever, so long as the property owner has a hearing as to the assessed value for taxation generally. He has that in the assessment for State and County purposes.

Applying this third distinction, we find the Legislature has used apt language to provide for the levy of a general tax. The tax may be voted before the improvements are fixed. How can the benefit be determined?

The fourth distinction suggested by Judge Cooley imports that a special assessment is levied for a particular improvement. We have, however, pointed out, that it is no part of the petition, nor necessarily of the order calling the election, that the roads should be designated therein. The designation of the roads is left to the discretion of the Commissioners Court. It can be done at any time the Court deems proper. It need not be done until after the bonds and tax have been voted.

A fifth distinction may be added, i.e., that special assessments are not subject to constitutional provisions requiring uniformity of taxation. The Texas decisions hold or clearly imply that all road district taxes are subject to the constitutional requirement of uniformity.

In Essays in Taxation, (9th Ed.), p. 415, to 417, Professor Seligman discusses the difference between special assessments and taxes. He says:

> "Special assessments, like fees, are not, however, taxes in the ordinary or narrower sense. Taxes, as we know, are compulsory contributions levied to defray the expenses incurred in the common interest, without any reference to particular advantages accruing to the taxpayer; but in special assessments, as in fees, the services for which the expenses are incurred redound to the particular benefit of the individual. The primary test of a tax is that it imposes a common burden; the primary test of a special assessment is that it implies a special benefit. From this one great distinction flow all the others, which may be summed up as follows:
>
> First. In a special assessment the special benefit to the individual is measurable. In a tax the special benefit does not exist, or, if it exists at all, results incidentally from the individual's share in the common benefit; it is not separately measurable.
>
> * * * * * * *
>
> Secondly. Taxes may be proportional to property, or to income, or to expense, or to any other test of faculty, or they may be progressive rather than proportional; special assessments can never be progressive, but must always be proportional to benefits.
>
> * * * * * * *
>
> Thirdly. Special assessments are confined to specific local improvements, while the sphere within which taxes operate is in this respect unlimited.
>
> Fourthly. For a special assessment the government performs a definite, particular act in return; it is an instance of service and counterservice, of give and take. For a tax the gov-

ernment does not pledge itself to do a particular thing for the particular individual in return. The reasoning here is precisely the same as that adduced above in discussing the distinction between taxes and fees. A special assessment is here on exactly the same footing as a fee.

Fifthly. Taxation is resorted to in order to defray the running expenses of government, and *to effect in time the amortization of the debt;* while the object of special assessments is in the main to provide for the capital account—to increase, as it were, the permanent plant of the community."

Professor Seligman also discusses the distinction between a special assessment and a special tax. He says, pp. 415, 416:

"No one, perhaps, will be apt to confound a special assessment with a general tax; but there is also a clear line of distinction between a special assessment and a special tax. An adequate discussion of the relation between a general tax and a special tax belongs to the question of the subclassification of taxes in particular, and would lead us too far astray here. But we can say at all events this: a general tax, like the ordinary state or local tax in America, is not levied for any definite, particular expenditure, but is assessed for general governmental purposes; a special tax, like the English local rates or the local taxes in some American states, like New Jersey, is assessed for the accomplishment of some special task to which the government is pledged, and is levied on a definite section of the population. The police rate, the sewer rate, the poor rate, the lighting rate, are each levied for the special purpose and on the definite class of taxables subject to the rate. But this special tax is none the less a veritable tax; it is levied for a

> public purpose, it is assessed on what is deemed to be the faculty or 'means' of the taxpayer; and there are no particular benefits accruing to him as an individual. Even if he does perchance derive a benefit, it is not a special, measurable, individual benefit apart from the common benefit that the other members of the class derive; it is simply an incidental result of his share in the common benefit. * * * In other words, the test of the special assessment is measurable special benefit; the test of the special tax is special taxable capacity or faculty, just as the test of the general tax is general taxable capacity or faculty. The distinction is quite clear; yet the few writers who have spoken of special taxes at all have almost universally confused them with special assessments."

It must always be kept in view that all taxes presume a benefit to the taxpayer, but in the case of taxes strictly as such, the benefit is one which is common to the community. In the case of special assessments, the benefit is one which is special and peculiar to the property taxed. In *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, where it was held that cars of a refrigerating company permanently employed outside the State of the company's domicile, are not taxable by that State as personal property within its jurisdiction, Mr. Justice BROWN said:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the *creation and maintenance of public conveniences in which he shares*, such, for instance, as *roads*, bridges, sidewalks, pavements, and schools for the edu-

cation of his children. * * * But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owner of property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or *of a road tax, though he never use the road.* In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. * * * Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. It is often said protection and payment of taxes are correlative obligations."

In *People* v. *Whyler,* 41 Cal. 351, RHODES, C. J., said at pages 354, 355:

"The principal reason urged in support of the position that the charge is an assessment, is that it is levied for the purpose of making a local improvement. Acts almost innumerable have been passed, levying taxes for such purposes, and no cases are called to our attention which hold, that by reason of the purpose for which they were levied, they became assessments. Taxes for the construction of roads, bridges, and school houses are familiar instances. The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose.

There is no sufficient reason for holding that the charge is not, what the Legislature declared it to be— a tax.

* * * * * * *

"It is further alleged, that the tax was levied to pay for a local improvement, and was not assessed upon property in proportion to the benefits derived from the work. If the Legislature intended that a tax should be levied, and if it may be levied, to pay for a local improvement, it is not only no objection to the Act, or the proceedings that were had under it, that it is not levied upon property in proportion to the benefits received by means of the improvements; but if a tax should be levied on that principle, it would be fatally defective, because lacking the constitutional qualities of equality and uniformity. A tax is equal and uniform, which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden, when the valuation of each parcel is ascertained in the same mode—the mode prescribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc. Absolute equality is unattainable, and the benefits derived, or to be derived, from the expenditure of the tax, cannot be taken into the account."

We respectfully call the attention of the Court to *In re Bonds of Orosi Public Utility Dist.,* (Cal.), 235 Pac. Rep. 1004. In that case, the statute as originally enacted, and as it stood when respondent district was formed, did not provide for any notice or hearing on the petition for the formation of the district. The Court conceded that if it were formed for the purpose of assessing upon the lands within its boundaries benefits to be derived by the lands from some public improvement, the statute

was unconstitutional. The Court, however, held that the statute created a public corporation, the inhabitants and property owners of which are subject to taxation for municipal purposes and may properly be so subjected without any hearing as to the benefits to be derived from the creation and conduct of such corporation. The particular works involved in the District were the construction of water works in rural territory. The court said (p. 1010):

> "It is quite apparent to us that the Legislature had in view such association of the people living in the outlying districts, when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state. It thereby provided for the creation of public agencies or quasi municipal corporations, the declared purpose of the act being to extend to the inhabitants of such districts, when properly organized, advantages in the use and benefit of certain utilities which they might not be able to obtain in any other way, and which, from common experience, we know tend to promote the general welfare of the people of the state. That it had the power to do so cannot be denied."
>
> "We take it to be now a generally accepted proposition that, while a municipality, which undertakes to supply those of its inhabitants who will pay therefor with utilities and facilities of urban life, is performing a function not governmental, but more often committed to private corporations or persons with whom it may come into competition, it is, in fact, engaging in business upon municipal capital, and for municipal purposes. 28 Cyc. 125. Any tax, therefore, levied and collected for the purpose of supplying such municipal capital is not a tax or assessment on property

directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns."

In *Shoshone Highway Dist.* v. *Anderson,* 22 Idaho 109, 125 Pac. 219, the question related to the character of certain highway districts organized in much the same manner as in the present case. The Court sustained the constitutionality of the statute, and the validity of the proceedings, and said, (p. 223):

"The Legislature in this instance has seen fit to provide only for the creation of highway districts for the purpose of improving the highways of a section created into a district. It has determined this matter and what property is subject to taxation therein, and the method of apportioning the fund raised, and it was acting clearly within its constitutional right, and there is no attempt on the part of the Legislature to impose taxes for the purpose of any county, city, town, or other municipal corporation, but a clear exercise of legislative authority granting to a community subject to certain restrictions the right to organize themselves into a municipal corporation with power of local taxation, and the issuing of bonds for public improvements, and the section of the Constitution above referred to in no way prohibits such legislative action. A highway district, as created in this act, is not a municipality such as a county, city, town, or village, but is an entirely different kind of municipality created for a specific purpose. Fenton v. Board of County Commissioners, 20 Idaho, 392, 119 Pac. 41; Boise Irr. etc. Co. v. Stewart, 10 Idaho, 38, 77 Pac. 25, 321; Hettinger v. Good Road Dist. No. 1, 19 Idaho, 313, 113 Pac. 721."

In *Hopkins* v. *Special Road and Bridge Dist. No. 4,* 73 Fla. 247, 74 So. 310, the court had before it an act to create special road and bridge districts. The taxes were directed to be assessed, equalized and collected upon the taxable property in the district by the same officers and in the same manner as is provided by law for the assessment, equalization and collection of other county taxes. The court referred to this provision and other provisions of the statute, and said:

> "These and other provisions clearly indicate a legislative intent to provide for the establishment of permanent territorial subdivisions of counties and to make the 'construction, repair and maintenance' of 'permanent roads and bridges' in such subdivisions, a governmental purpose and function. This being so, the taxes levied under the acts are for a governmental purpose within the power of the Legislature, and no question of special assessments for local benefits is presented. In this view the acts are an exercise of the taxing power in a manner and for a purpose not forbidden by the Constitution, and the limitations as to notice and benefits that may be incident to local assessments for special benefits to property are not applicable."

The Court further cited its decision in *Stewart* v. *De Land-Lake Helen Special Road and Bridge Dist.,* 71 Fla. 158, 71 So. 42, where it held that the distribution of the tax on all the taxable property in the District complied with the requirements of the Constitution that the Legislature should provide for a uniform and equal rate of taxation, that provision having reference merely to the property subject to taxation.

This case is cited in the subsequent case of *Charlotte Harbor & N. R. Co.* v. *Welles,* 78 Fla. 227, 82

So. 770, a decision which was affirmed by this Court upon writ of error. See 260 U. S. 8.

Griggsby Const. Co. v. *Freeman, Tax Collector,* 108 La. 435, 32 So. 399, was a suit to enjoin the seizure of property for the payment of a delinquent tax. Among the taxes was a bridge ward tax,—in other words, a tax for the construction of a bridge levied on all the property in a ward of the parish. The court held that this tax was a general tax, saying:

> "The essentially characteristic feature of a local assessment is that it is levied on particularized property, and not on property generally. Charnock v. Levee Dist. Co., 38 La. Ann. 327. This feature is the corollary of what in theory, if not in actual practice, is the fundamental principle of the law of local assessment,—that the tax should be levied on each particular piece of property in proportion to the benefit it is to derive (not supposedly only, but actually) from the expenditure of the avails of the tax. The mere localness of the tax is not necessarily a distinguishing feature. Nor is the fact that the tax was imposed only after consultation of the taxpayers. Consultation of the taxpayers might have been dispensed with by the framers of the constitution in authorizing the imposition of the tax; and, on the other hand, local assessments may be, and every day are, levied without consultation of the contributors. As this tax, though local, is levied on property generally, and irrespective of special benefit, we conclude that it is not a local assessment."

See also

Wight v. *Police Jury,* 264 Fed. 705.

In *Louisiana & N. W. R. Co.* v. *State Board of Appraisers,* 120 La. 471, 45 So. 394, the Court held

that the tax of 10 mills authorized by Art. 232 of the Constitution (in force in 1900), to be levied in aid of public schools is not a special assessment, and therefore, property exempted from taxation by the Constitution, is not subject to it. The Court said:

> "The tax is shown to be an ordinary tax by the very fact itself of express authority having been given for its levy. The Constitution has left the power of taxation unlimited and untrammeled in that phase of it by which special assessments are levied. This is established by an abundant and firmly settled jurisprudence. Had this tax, therefore, been a special assessment, no express authority for its levy would have been needed, and none would have been given."

It is apparent that the reasoning of Mr. Justice BUTLER in the present case can be made applicable to taxes which are voted by a similar process for the erection of school buildings. It is a common and every day occurrence for application to be made that the boundaries of school districts be modified to permit the erection of improved school buildings, particularly in the case of high schools. This is done frequently by the voluntary action of the County Board of Education or Board of Supervisors, as the case may be without any hearing. Thereupon, a petition is presented signed by a specified number of voters, and an election is ordered on the question of issuing bonds in a specified amount and levying a tax for the purpose of erecting a specific building. Every element of a special assessment mentioned in the opinion in the present case applies under such circumstances. But PROVOSTY, J., in the Louisiana case last cited, says:

> "Indeed, the fact that the tax is in aid of the public schools shows conclusively that it is a mere ordinary tax. How could a tax in aid of the public schools be a special assessment when the maintenance of the public schools is one of the most ordinary of the ordinary charges of our government, and, by the most elementary principles, our government must have recourse to ordinary taxation for meeting its ordinary charges, and cannot have recourse to special assessments."

Everything that the learned Justice said with reference to public schools, is true of State highways, one of which is a Federal aid highway and is also true of county roads which are to be improved under the direction of the regular highway authorities, viz.: the County Commissioners Court, acting under and controlled to a certain extent by the State Highway Commission in the case of the State highway. The construction of highways and their maintenance is an ordinary obligation of government. They are rural highways, and although in some States, the practice has arisen of improving such highways by special assessments, such has never been the case in Texas.

On the subject of the distinction between general taxes and special assessments in Louisiana, see also,

> *Louisiana R. & N. Co.* v. *Madere,* 124 La. 635, 50 So. 609;
> *Charnock* v. *Levee Dist. Co.,* 38 La. Ann. 323;
> *Munson* v. *Board of Commissioners,* 43 La. Ann. 15, 8 So. 906.

In *Maltby* v. *Tautges,* 50 Minn. 248, 52 N. W. 858, the Court sustained an apportionment by the

County Commissioners of a bridge tax, although no notice or hearing was provided for in the statute authorizing the creation of the district. The district was created by the County Commissioners under statutory authority delegated to them by the Legislature.

Under Special Laws of Minnesota, 1889, amended by Special Laws, 1891, Chapter 359, the County Commissioners of Dakota County were authorized to issue bridge bonds of the County and to designate certain townships and parts of townships which should contribute to the payment of the debt. The County Commissioners, without notice and a hearing, designated seventeen towns and parts of towns as those which should contribute, and also designated the amount which each should contribute. The tax was contested on the ground it was not uniform in the several districts. The Court said, p. 251:

> "It is not questioned, and under the authorities could not be successfully, but that, where a tax is levied for some special or extraordinary purpose, such as this, and where in order to determine and fix the taxing district or districts and apportion the tax among them, it is necessary to enter upon such inquiries as to facts as cannot well be made directly by the Legislature, it is competent to refer the matter to the local authorities, or to a commission appointed for that purpose, to fix the taxing district or districts and to apportion the tax. Hence this case stands upon precisely the same footing as if the towns or parts of towns which were to contribute to the expense of building this road had been designated, and the expense apportioned among them, by the Legislature itself. * * * (p. 253). Taxing districts may be as numerous as the purposes for which the taxes are levied; and it is not essential that

> the political divisions of the State shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring the lines of the political subdivisions of the State. * * * And, to give locality to a purpose in respect to which a public expenditure is to be made, it is not essential that the public work created by means thereof should have its *situs* within the district. It is the districts *interest* in the improvement, and not its location, which is the test whether an object is or is not a proper subject of district taxation. Hence the fact that the road constructed in this case was located wholly in one of the towns taxed is not important."

In *Gulf & S. I. Railroad Co.* v. *Ducksworth,* 286 Fed. Rep. 645, the railroad company sued to enjoin the collection of road district taxes under a statute of Mississippi. The Court held that in the manner in which the District was formed and the bonds authorized, there was no denial to the appellants of any right under the Constitution of the United States, KING, J., saying,

> "The tax was not a local assessment levied upon the theory that the improvement was a special benefit to the abutting property, but was an *ad valorem* tax levied on all of the property in the district, whether it abutted on said highway or not. * * * Here there is no assessment for a local improvement, but a special *ad valorem* tax levied on all the property in the road district on a valuation as to which no objection of any discrimination or unfairness is alleged."

In *Reed* v. *Howerton Engineering Co.,* 188 N. Car. 39, 123 S. E. Rep. 479, a sanitary sewer district in rural territory was created by the County Commissioners of Buncombe County under Public Local Laws 1923, Ch. 341, and bonds were voted

by the electors. It was claimed that the bonds were illegal and void for the reason that no notice was given or opportunity afforded to the property owners, whose property was affected by or included in the district, of a hearing on said matters, and no hearing was had, and that the boundary lines of said district were not fixed by the General Assembly, but the power to fix the boundary lines was delegated to a majority of the qualified voters of the proposed sanitary district who set forth the property to be embraced in the proposed sanitary district.

It will be seen from this statement that except for the purpose of the bonds, the case was substantially the same as Road District No. 2 of Archer County. After examination of the authorities, the Court sustained the validity of the formation of the district and the validity of the bonds as a proper and legitimate exercise of the power of the Legislature to delegate to the County Commissioners authority to create a taxing district.

> "In Bowles v. State, 37 Ohio St. 35, this court held, and we think correctly, that the levy under this one mile assessment law is a tax and not an assessment. Being a tax the general assembly derives its powers to levy the same from section one of article two of the Constitution, which vests all legislative power in the general assembly. The power of taxation so vested in the general assembly is supreme except as limited by other provisions of the Constitution, and the provision against the passage of retroactive laws, and laws impairing the obligation of contracts, is, in a proper case, a limitation upon the taxing power."
>
> per BURKET, J., in *Miller* v. *Hixson*, 64 Ohio St. at pp. 49, 50.

In *Howes* v. *Racine* (1856), 21 Wis. 514, it was held that a tax levied generally upon all property of a ward of the city to pay the expense of an improvement is a tax in the ordinary sense in which that term is used and not a special assessment.

In *Hale* v. *Kenosha* (1872), 29 Wis. 599, where the Court held that taxes levied upon the land in the city to pay for a subscription for a railroad extending beyond the city limits, are a tax as distinguished from an assessment; that the constitutional rule as to uniformity applies thereto, and that the tax cannot be levied on the lots excluding the improvements thereon, LYON, J., said:

> "In a general sense, taxes are burdens or charges imposed by the legislative power of a State upon persons or property for public uses, while assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improvement and are laid with reference to the special benefit which property is supposed to have derived from the expenditure. Such assessments may be imposed upon a part of the property in a municipality, to the exclusion of the balance thereof; and this may lawfully be done without regard to the constitutional rule of uniformity or the value of the property upon which the cost of the improvement is charged. * * * We are not aware of the existence of any adjudged case, or of any principle of law, which authorizes an assessment upon specific property to defray the expense of making an improvement outside the corporate limits of the municipality in which such property is situated."

Decisions Denying That Rural Highways Can Confer Any Special Benefit.

In some jurisdictions it is held that the owners of property on or near an ordinary country road cannot be made to bear the expense of improving it; for a rural highway is not a "local improvement" and the benefit of improving it results to the general public.

See

Cooley on Taxation, 3rd Ed., Ch. 20, p. 1160, citing:
Graham v. *Conger,* 85 Ky. 582;
Conger v. *Bergman* (Ky.), 11 S. W. 84;
Conger v. *Graham* (Ky.), 11 S. W. 467;
Sperry v. *Flygare,* 80 Minn. 325;
In re Washington Ave., 89 Pa. St. 352.

In *Sperry* v. *Flygare,* above cited, decided in 1900, BROWN, J., referred to the hardship which resulted to property owners from the levy of special assessments for the improvement of streets and sidewalks in the larger cities, saying that they have

> "in some instances reached a point well nigh to confiscation."

He added:

> "Property owners of moderate means have been compelled to abandon their property, or sacrifice it by sale for much less than its actual value to avoid total loss."

But in the general tax, which we contend has been imposed upon the plaintiffs as owners of real estate in Archer County, at the rate of 4.17 cents per year for each acre, or an aggregate of about

$1.25 spread over a period of thirty years, there can be no such element of hardship or loss or confiscation. It is simply a reasonable imposition.

Brown, J., further points out, in the case cited, that in the city the improvement will benefit and improve the property abutting upon the improved street, but will not benefit property remote therefrom, while in the country districts, the highways are an advantage to the public at large and benefit thereto is not confined to farms through which they may pass. He also pointed out that drains or ditches constitute a peculiar benefit to lands adjacent to which they are constructed, such lands being thereby reclaimed and made suitable and fit for agricultural purposes, and thus furnishing a just and proper basis of determining that a special benefit existed. He made the same remarks with reference to other improvements in public streets, such as sewers, sidewalks, etc., and added:

> "But not so with reference to farm lands adjoining a public road. Such road is not a special benefit to the farm, or the owner thereof, independent of, and unconnected with, the public benefit. It might be such a benefit if in its construction and improvement it drained wet and swampy portions of the land, or improved the same in some other special way. But such highways are not ordinarily beneficial in those respects. In speaking on the subject of local improvements in the case of State ex rel. v. Reis, 38 Minn. 371, 38 N. W. 97, Mitchell, J., said: 'It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a "local improvement" are those which the term itself implies, viz., that it shall benefit the property on which the cost

> is assessed in a manner local in its nature, and not enjoyed by property generally. * * * This construction is fully warranted by the definitions of the word "improvements" given by lexicographers. It has been defined as "that by which the value of anything is increased, its excellence enhanced, or the like;" or "an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes".' A rural highway does not come within this definition. Such a 'road is devoted to the public use. It is a country road in which the entire public is interested, and where the owners of adjacent land, although not touching the road, are equally benefited with those living directly upon it.' A highway extending through a county is not ordinarily of any greater benefit to lands through which it passes than to lands further removed therefrom."

Judge BROWN further declared that the Legislature might no doubt create and establish taxing districts and provide for the taxation of lands therein for the public improvements.

The significance of these rulings is, that the States of Minnesota, Pennsylvania and Kentucky seem to have adopted the rule that a rural highway cannot be a special benefit to abutting property so as to justify a special assessment, and it is impossible to improve the highway by any other means than by the levy of general *ad valorem* taxes.

In Texas there is no machinery by which a special assessment on the basis of benefits can be made against the property which abuts on the Southwest Trail or the Ozark Trail, or any other rural highway in the State. There is no way in which the

benefits can be determined or any investigation can be made, and there is no authority to raise the money in any other way than by a "tax". The term used is applicable and appropriate to a general *ad valorem* tax levied by reason of the performance of a governmental duty and the present case would seem to come within that line of decisions which holds that the power of taxation by special assessment cannot be exercised by a city or any other corporate authority unless the power has been expressly and clearly conferred by the Legislative Department of the Government.

See *Chicago* v. *Law,* 144 Ill. 569, where the cost of widening a river was sought to be assessed as a local improvement and the statute only authorized a "tax". It was held that the power to tax did not include the power to make a special assessment.

See, also, *Morgan Park* v. *Wiswall,* 155 Ill. 262, where a village was given authority to levy a "tax" for waterworks purposes. It was held that certain improvements were not of a local nature and special assessments therefore could not be authorized.

See, also, *Hughes* v. *Momence,* 164 Ill. 16, 19, where the City was authorized to levy a tax for the construction of waterworks, and it was held that it could not make a special assessment therefor by virtue of the authority conferred.

Wherever we turn, whatever principle we find, in every instance, the decisions are such as to deny the possibility that the powers exercised in the present case to levy a tax for improvement of rural highways can be regarded in any sense as imposing an impost in the nature of a special assessment based upon benefits.

IV.

The decision in the instant case is in conflict with a long line of decisions by this Court.

The procedure adopted by Texas in organizing road districts and issuing bonds, is not only justified by the decisions of the Courts, but is sanctioned by a line of decisions of the Supreme Court of the United States sustaining bonds and taxes over a period of fifty years. No question as to the validity of the districts or the regularity of the procedure has been suggested in these decisions.

The decisions cited above support the view that the Courts of the States have uniformly construed legislation such as is involved in this case to have been constitutional and valid, not only against the Constitutions of the States, but also as against the Constitution of the United Staes. They also show that the general view has been that a "tax" levied pursuant to such provisions is a general tax.

It is highly significant that a line of decisions is to be found in the reports of the United States Supreme Court which tend to sustain the organization of taxing districts in a manner almost identical with the present case.

In *Ogden* v. *Daviess County,* 102 U. S. 634, the Missouri Legislature by an act of January 4, 1860, incorporated the Platte City & Des Moines Railway Company (afterwards the Chicago & Southwestern Ry. Co.), and by section 7 of the Charter provided:

> "Upon the presentation of a petition of the President and directors of said company to the County Court of any County through which said road may be located, praying that a vote may be taken in any strip of country through which it may pass, not to exceed ten miles on either side of said road; that the inhabitants thereof are desirous of taking stock in said road and of voting upon themselves a tax for the payment of the same—it shall be the duty of said County Court to order an election therein * * * and if a majority of the taxable inhabitants shall determine in favor of the tax, it shall be the duty of said court to levy and collect from them a special tax."

Daviess County attempted to issue bonds, but the Supreme Court of the United States held that this statute did not authorize the issuance of bonds. But Chief Justice WAITE, who delivered the opinion of the Court, used language describing the obligation which rested on the inhabitants of the "strip" by reason of the provision above referred to, and declared that *"without doubt"* the charter authorized the taxable inhabitants to vote a tax upon themselves and required the County Court to levy and collect such a tax if voted. He said, p. 638:

> *"Without doubt* sect. 7 of the Charter of the Company authorized the taxable inhabitants of the 'strip of country' designated *to vote a tax upon themselves* to take stock and required the County Court to levy and collect such a tax if voted and pay over the money as fast as collected to the treasurer of the Company; but in this we find no authority for the County to issue bonds in anticipation of the tax. The taxable inhabitants of the strip of country could not themselves make a bond and all the county court could do was to collect and pay

> over the tax they voted. The inhabitants were not even organized by themselves, much less made a body politic for any purpose. They could vote the tax, if called upon to do so, by the County Court, but that was all. The effect of their vote was nothing more than to authorize the County Court to levy, collect and pay over to the treasurer of the Company, the special tax they had determined upon."

Again speaking of an act under which it was claimed that bonds might be issued and which expressly authorized the issuance of bonds by municipal townships, Chief Justice WAITE said:

> "Under the charter the taxable inhabitants of the strip were to take the stock and they were to be taxed."

He added:

> "Neither the county, nor a city, nor a town took the stock now in question. The county did not owe any debt. The taxable inhabitants of the 'strip of country' had authority to *vote to tax themselves* for the stock. In this way they could bind themselves, but that did not create a debt of the county as such, for which funding bonds might be issued. * * * The County Court and other officers of the County could be compelled to levy, collect and pay over the tax, but that was all the county or its officers were required to do."

This language indicates that Chief Justice WAITE had no question in his mind as to the validity of the charter provision above quoted, although it did not provide for notice and a hearing on the question whether the strip of country was benefited and whether a tax should be levied on it.

It is peculiarly significant that in the case cited, the "strip of country" was not defined by any body,

public official or even by its citizens, but was defined by the President and Board of Directors of the railroad seeking to have the tax levied and collected for it special use. Yet this fact did not make Chief Justice WAITE hesitate. It did not cause any doubt in his mind as to the validity of the tax which had been voted, otherwise he would not have declared that "*without doubt*" section 7 of the company's charter

> "authorized the taxable inhabitants of the 'strip of country' designated to vote a tax upon themselves."

See also *DeLand* v. *Platte Co.*, 54 Fed. Rep. 823.

In *Nebraska* precinct bonds have been issued, i. e., bonds which are the obligations of the county, but payable exclusively from precincts. These precincts have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of the precincts for political, administrative and judicial purposes, but they are in no sense the representatives of the people as in municipalities. The precincts are governed by the County Commissioners. Their relation to a county is like that of a ward to a city.

See,

Clapp v. *Otoe County*, 104 Fed. Rep. 472, 478.

Under the statute of *Nebraska*, bonds have been issued by counties for these precincts for internal improvements for many years. The election is called by the County Board on the petition of fifty freeholders, without any notice or hearing and the

proposition must be accompanied by a provision to levy a tax for the payment of the principal and interest of the bonds. (See Rev. Stat. Neb. 1913 §§410, 413.) The petition fixes the nature of the work contemplated, amount of bonds, rate of interest, and term of bonds. Under this statute, many bonds have been issued and it has never been suggested that the tax was a local assessment and not general *ad valorem* taxation.

See,

County Commissioners v. *Chandler*, 96 U. S. 205.

Bridge Bonds held to be valid. Mr. Justice BRADLEY saying:

> "Railroads, turnpikes, bridges, ferries, are all things of public concern, and the right to erect them is a public right."

Davenport v. *Dodge County*, 105 U. S. 237.

Bonds for wagon bridge held valid. Mr. Chief Justice WAITE, saying:

> "The only difference between the two kinds of debt is, that in one all the taxable property of the county is charged with its payment and in the other only a part. In both the mandamus to enforce the levy and collection of necessary taxes, lies to the proper officers of the County alone."

United States v. *Dodge County*, 110 U. S. 156. Bonds for a wagon bridge. Mandamus granted

> "to levy a tax on the taxable property of Fremont precinct."

Blair v. *Cuming County*, 111 U. S. 363. Bonds for improving water power of river for use of public grist mills held valid.

Nemaha County v. *Frank*, 120 U. S. 41. Railroad aid bonds and coupons held valid

> "the mode of payment being by means of a tax to be levied by the County Commissioners upon the property within the bounds of the precinct" (per Mr. Justice MATHEWS).

In *Clapp* v. *Otoe County*, 104 Fed. Rep. 473, *Sanborn*, J., who delivered the opinion of the Court, referred (p. 480, 482), to the fact that the County Commissioners had power to divide the County into precincts, to subdivide precincts and to alter precinct lines.

An Act of the Legislature of *Kansas* of 1870, in relation to railroad aid by townships required a petition of fifty qualified voters. Such petition framed the proposition to take stock in the railroad, designated the railroad company, the amount of stock to be taken and the terms of payment and conditions of subscription. When presented the County Commissioners were given no discretion but must call an election to be held to determine whether the subscription should be made. Whenever bonds were issued, it became the duty of the County Commissioners

> "annually to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as it becomes due and to create a sinking fund sufficient to pay said bonds at maturity."

Taxes were to be collected as county and township taxes are collected.

Marcy v. *Township of Oswego*, 92 U. S. 637, sustained the validity of bonds issued under this act, Mr. Justice STRONG saying, (p. 640):

> "The board was to order the election if certain facts existed and only then. It *was required* to act, if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment."

In *Humboldt Township* v. *Long*, 92 U. S. 642, bonds were issued under the same statute and the validity of the bonds was sustained. It will be noted that the railroad company was selected, the amount of stock was determined and the mode and terms of payment fixed by the petition, and the election was held upon the matters so fixed.

That the Courts considered the levies in these cases as "*taxes*," is shown by the language of the dissenting opinion in the Humboldt Township case, p. 647, were Mr. Justice MILLER said:

> "The *power of taxation* which has repeatedly been stated by this court to be the most necessary of all legislative powers and least capable of restriction, may by positive enactments be limited."

In *Missouri*, until recently, townships were only territorial subdivisions of the State for convenience in the administration of county matters. The Township Aid Act of Missouri of 1868, is set out in 95 U. S. pp. 361-363. When twenty-five persons, taxpayers and residents, petition the County Court setting forth their desire "as a township" to sub-

scribe to the capital stock of the railroad, stating the amount of the subscription, terms and conditions in which they desire such subscription shall be made,

> "it shall be the duty of the county court"

to order an election. If two-thirds of the qualified electors vote in favor, the bonds must issue. The means provided is

> "a special tax, which shall be levied on all the real estate lying within the township making the subscription in accordance with the valuation then last made by the county assessor for county purposes."

In *Harshman* v. *Bates*, 92 U. S. 569, it was held that this act was unconstitutional, as it did not require a vote conforming to the provisions of section 14 of Art. 11 of the Missouri Constitution, viz.: "two-thirds of the qualified voters," but only two-thirds of those voting at the election. This decision was overruled in *Cass County* v. *Johnston*, 95 U. S. 360. The court, in an opinion written by Mr. Chief Justice WAITE as to the enforcement of the obligation of the bonds in the United States Courts, said the court was

> "satisfied with the conclusions reached by the court below and that a judgment may be rendered against the county to be enforced if necessary by mandamus against the county court or the judges thereof, to compel the levy and collection of a tax in accordance with the provisions of the law under which the bonds were issued."

The New York Statute (N. Y. Acts 1869, Ch. 907), authorizing municipal corporations, includ-

ing townships, to issue railroad aid bonds, has been before this Court. That statute provided that whenever a majority of the taxpayers should make application to the County Judge by petition setting forth that they are a majority and represent the majority of the taxable property, and they desire that bonds shall be issued in an amount named in the petition and invested in the stock or bonds as the petition may direct, of a railroad company, it is the duty of the County Judge to publish a notice and to hold a hearing. At such hearing the County Judge must take proof as to the allegations of the petition and if it shall appear that the petitioners do represent a majority of the taxpayers and do represent the majority of the taxable property, he shall so adjudge and determine and forthwith appoint three persons as commissioners to issue the bonds. Bonds issued under this statute were before this Court in *Orleans* v. *Platt*, 99 U. S. 676, a suit upon interest coupons, in which judgment was rendered for the plaintiff. The judgment was affirmed. Also in *Lyons* v. *Munson*, 99 U. S. 684, where a judgment on coupons against the town was affirmed.

The hearing provided in this act is limited to ascertaining whether the petition has been properly signed. If it has been so signed, the Court must appoint the Commissioners and the bonds must issue. The amount of the issue and the railroad to be aided are selected by a majority of the property taxpayers and no hearing is held on these matters. This issue is not even authorized or fixed by the action of any elected representatives of the town. The amount of the subscription, the railroad to be aided and the question whether bonds shall be issued are determined by a body of individuals who

happen to own and represent the majority of the taxable property. No meeting of this body- is called; no election is provided for, and yet, this Court has sustained without question, the issuance of the bonds as fixed and directed by the body so selected.

In all of these cases, there has never been a suggestion by this Court that any provision of the Federal Constitution can affect the validity and regularity of the action. In *Ogden* v. *Daviess, supra,* the levy of a tax on a "strip of country" was set in motion on the petition of the officers of the railroad company. Under the *New York* statute, the entire question of issuing the bonds was fixed and decided by a private document circulated among a majority of the property taxpaying voters of the town, and thereupon all the property in the town was subjected to a tax. In *Nebraska,* on a petition arbitrarily selecting a precinct created for other purposes, an election is called to submit to the voters the question of issuing bonds for internal improvements,—improvements which, in their nature are peculiarly local,—yet it was never suggested by this court that these improvements were to be regarded as of such a nature that the tax levied therefor must be considered to be a special assessment. It was never suggested by this court at any point that notice and a hearing on the question of benefits was required in any of these cases.

Chief Justice WAITE declared that "without doubt" the tax voted at an election called on the petition of the railroad officers could be levied and collected. He had no question as to the regularity and validity of the procedure. If he had, it is in-

conceivable that he should have used the language which he did.

These cases illustrate that it has been the practice in the United States for fifty years at least, to permit the inhabitants of any territory that may be selected in any manner that the State proposes, to vote upon themselves *ad valorem* general taxes for the purpose of aiding in enterprises of a public nature. Such enterprises have taken many forms. Railroads, wagon and toll bridges, improvement of water courses, and other similar matters. Some of these at least are of the character which should be designated as local improvements.

In almost all of these cases, the purpose for which the bonds were voted was specific, i.e., the bridge, or a water course, or a grist mill, was identified. Yet it was never suggested that the bonds issued and the tax levied must necessarily be special assessments because they were voted and issued for a specific purpose.

It was never suggested in any of these cases that the impost which was levied might by any possibility be regarded as a local assessment for benefits and subject to the peculiar rules applicable thereto.

It is well known that the contest over these securities was prolonged and bitter. Every possible question was supposed to have been litigated in the cases which arose, and when this court sustained against all known objections, as it did, this method of procedure, it was natural that the States and officials and citizens should consider that they furnished a suitable and reliable guide for the issuance of securities for other works and improvements. The books may be searched in vain for anything to show that it was ever suggested that

the imposts levied in these cases and enforced by judgments of mandamus from this court were special assessments based upon benefits.

Surely, the people were entitled to rely upon the practice outlined in these cases as furnishing a rule for the guidance of officials and as embodying evidence of a practical interpretation of the law, bringing into operation the principles of *stare decisis,* rule of property, and practical interpretation.

V.

The steps taken by the petitioning voters, the county commissioners court and the voters of Archer County, have created a public and quasi-municipal corporation. The creation of such corporation is exclusively a State affair and does not involve any Federal question and the Legislature, without violating the Federal constitution may confer upon such corporation the power to levy general *ad valorem* taxes for the purpose of paying its corporate debts and liabilities.

By Art. 637, Texas Revised Civil Statutes, 1911, it is provided:

> "For the purpose of this subdivision of this chapter, any political subdivision of a county or defined district, now or hereafter to be described and defined, accepting the provisions of said subdivision, by voting such tax, is hereby made and created a body corporate, which may sue and be sued in like manner as counties."

In 1925 (Gen. Acts 1925, Ch. 132, p. 334) the legislature amended this section by adding the words,

> "and if cast in such suits, shall pay such judgments by the levy of taxes."

It is within the power and discretion of the Legislature of Texas to give the district so created, a public or quasi-municipal corporate character, and the action of the Legislature in so doing, did not violate any provision of the Federal Constitution.

Kelly v. *Pittsburgh*, 104 U. S. 78, involved the power of the City of Pittsburgh to tax annexed farming lands, which the plaintiff claimed had arbitrarily been annexed and should not have been subjected to taxation for urban purposes. This Court conceded that quite probably the exaction was unjust, so far as the plaintiff was concerned, saying, per Mr. Justice MILLER, at p. 80:

> "The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire."

Mr. Justice MILLER further added, page 80:

> "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city

> and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, city, or a township organization, is one of the most usual and ordinary subjects of State legislation."

In the year 1925, based upon long established practice, Road District organizations must be added to the list.

In *Forsyth* v. *Hammond,* 166 U. S. 506, where the Indiana Legislature authorized the annexation of contiguous territory with or without the consent of the owners, this Court ruled that no question could arise as to the validity of the annexation under the Constitution of the United States, saying, page 518, per Mr. Justice BREWER:

> "It is for the State to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling."

Mr. Justice BREWER further added, page 519:

> "It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature."

So, too, there is nothing in the Constitution of the United States, which prevents the State of

Texas from confiding the organization of the territory of a district to any body which it desires, such as the County Commissioners Court, even, the property taxpaying voters. We have seen that the late Mr. Chief Justice WAITE expressed the opinion that "without doubt" the president and Board of Directors of a railroad company might set in motion and reasonably define the boundaries of a "strip of country" for the purpose of taxing that strip in aid of the railroad in which they were interested.

In *Claiborne County* v. *Brooks*, 111 U. S. 400, Mr. Justice Bradley, said:

> "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

In *McCain* v. *Des Moines*, 174 U. S. 168, the Supreme Court of Iowa had held an act purporting to extend the limits of the City of Des Moines to be unconstitutional, because it violated the constitutional provision in regard to special legislation. That Court, however, refused to issue *Quo Warranto* on the ground of laches, the territory having been annexed in fact for over four years, and the original organization having been abandoned. Mr. Justice PECKHAM, who delivered the opinion of this Court, held that the plaintiff, who claimed among other things that his property was being taxed by Des Moines for city purposes without color of right in violation of the Fourteenth Amendment of the Federal Constitution, had no standing for redress

before the Courts of the United States, saying, among other things (pp. 175, 176):

> "It will thus be seen that while the Supreme Court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional provision in regard to special and local legislation, yet the court also held, for the reasons stated, that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality of the present city organization was for those reasons sustained. * * * To grant the relief demanded would quite effectually *overrule the decision of the state court upon a question relating purely to the local law of the State.*"

Taxation is a legislative power, yet this decision says that although taxation is a legislative power, it may be based not only upon legislation which is concededly unconstitutional and invalid, but upon estoppel and mere color of an unconstitutional law without violating the Fourteenth Amendment. If general taxes for city purposes levied on the plaintiffs in *McCain* v. *Des Moines, supra,* did not raise any Federal question, giving this Court jurisdiction, then in what sense can it be said that a general road tax levied *ad valorem* upon all real and personal property in the district according to the assessment for State and county purposes and to be applied under the statute in the discretion of the governing authority on such roads as it may select, raises a Federal question? The grievance of Mr. Browning and his co-plaintiffs in the present case is insignificant compared with the claim for redress which the plaintiffs in *McCain* v. *Des*

Moines had, and yet this Court denied redress in the *De Moines* case.

These principles were re-affirmed in *Hunter* v. *Pittsburgh,* 207 U. S. 161 (1907). That case involved the annexation to the City of Pittsburgh of the City of Allegheny, and the transfer of all the corporate property of the City of Allegheny to the custody and control of the City of Pittburgh. The statute under which this was done, was a general act permitting the consolidation of two cities contiguous or in close proximity to each other, with any intervening land other than boroughs. The council of either city or two per centum of the registered voters of either city might present their petition to the Court of Quarter Sessions of the County in which the cities are situate, and the Court shall fix the time for the hearing thereof, direct notice to be given. Any person interested might file exceptions

> "but if the court shall find that the petition and proceedings are regular and in conformity with this act"

(in other words, the bare fact of the cities being contiguous or in close proximity and the lands to be included being intervening lands other than boroughs, and that the petition was signed by the requisite number,) the court shall order an election. The election was held. The population of the City of Pittsburgh voted for annexation. The population of the City of Allegheny voted against annexation, but the Court held that the vote controlled, although Pittsburgh having the greater number of voters could and did vote to take to itself the property of the City of Allegheny, against the vote of the citizens of Allegheny. It was held that no Federal

question was raised and the bill was dismissed. The claim was that the Federal Constitution was violated because the method of voting on the consolidation prescribed in the act permitted the voters of the larger city to overpower the voters of the smaller city, and compel the union without their consent and against their protest. (See 207 U. S. p. 177) Mr. Justice MOODY summed up the decisions of this Court at p. 178 and 179, his conclusion being:

> "The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. *In all these respects the State is supreme,* and its legislative body, conforming its action to the State constitution, may do as it will, *unrestrained by any provision of the Constitution of the United States.*"

It follows from these decisions that this Court has no power under the Federal Constitution to review the steps by which Road District No. 2 of Archer County became a public or *quasi*-municipal corporation of the State of Texas. That is a question to be decided by State polity. The decisions of the Courts of Texas on that subject are controlling, and if as we have seen, the Supreme Court of Texas has sustained the validity of such organizations and has held that they have been vested with the power of general taxation *ad valorem* for general highway purposes, such decisions do not at any

point contravene any provision of the Federal Constitution and this Court is without jurisdiction.

The method in which Road District No. 2 of Archer County was created, is substantially the same as that in which municipal corporations are created, not only in Texas, but also in many other States of the Union. It has never been suggested that these municipal corporations are created in violation of the Constitution of the United States, although they are vested with similar powers of taxation to those conferred upon the road district in the present suit. The Texas statutes in relation to the creation of towns and villages will be found in Texas Revised Civil Statutes, 1911, Arts. 1033, et seq., and particularly, Art. 1036.

VI.

No Federal question arises by reason of the act of the Legislature in conferring, and the decisions of the Supreme Court in construing, the power conferred as embodying the right to levy a general tax.

We respectfully invite a statement of the language which will confer a grant of general power of taxation. If this application is denied, the State of Texas will need such an expression for its guidance, because it is inconceivable that it will permit any default in the obligations which have been issued, or that it will substitute any tax, other than that upon the faith of which the obligations now out, have been sold. When the Legislature of Texas comes to meet this decision, in the event that a rehearing be not granted, in

what language will it frame the statute, so as to clearly grant an express power of general taxation?

The Constitution of Texas, Article 3, section 52 as amended, confers the right to levy a "tax." The Act of 1909, under which District No. 2 of Archer County is organized, provides for the levy of a "tax" or "taxes."

In the case of the statute, the exact language is that the bonded debt of the county incurred under the act, shall be paid from

> "a tax sufficient to pay the interest on such bonds and to produce a sinking fund sufficient to pay the bonds at maturity."

It will be noted that the tax is not levied to construct highways, but to pay the debt.

The further provision is added:

> "Said tax *herein authorized* shall be assessed and collected in the same manner as is now provided by law for the assessment and collection *of other road taxes* if for a whole county, and if for a political subdivision or other defined district of a county, then it shall be assessed and collected as is now provided by law for the assessment and collection of common school district special local taxes. And it is hereby made the duty of such Commissioners Court to levy such tax, and it is hereby made the duty of the Tax Collector and Assessor of such County wherein such taxes have been levied, to assess and collect the same in the same manner and at the same time as other taxes."

In the present case, Mr. Justice BUTLER says,

> "Resort may be had to general taxes and to special assessments to raise funds for the construction or improvement of roads"

citing, *Missouri Pacific Railroad* v. *Road District,* 266 U. S. 187, 190. In the case cited, Mr. Justice BRANDEIS said, p. 190:

> "Road building is a public purpose which may be effected by general taxation. The cost may be defrayed out of state funds; or a tax district may be created to meet the authorized outlay. The preliminary enquiry whether it is desirable to construct the road, is one in which all landowners within the district are interested. The Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed. Compare Kelly v. Pittsburgh, 104 U. S. 78."

We understand this language to necessarily mean that the imposition of a general *ad valorem* tax, although upon the limited district and not upon the State at large, does not present any question under the Fourteenth Amendment to the Federal Constitution. With all due deference, we submit to the Court that the language used in the act in relation to the imposition of the tax is just such as will be found in the case of a general tax as distinguished from a special assessment. It is the same language which has been repeatedly used in laying taxes for governmental purposes and it is *not* the language which is usually used when a special assessment is imposed. Even if there be a disposition to elevate a special assessment to the dignity of a tax, the impost will usually be described as a special local tax, rather than simply a tax on all the taxable property to be levied and collected in the same manner as other general taxes are laid.

We have shown above (Point V), that neither the organization of a public or quasi-municipal corpor-

ation, nor the powers which the State confers upon it *per se* raises any question under the Federal Constitution. It is within the power of the State to confer upon it such powers as it deems necessary. One power that is essential for corporate purposes, is the power of taxation, and it is significant that if this statute had not included any express grant of authority to levy a tax, yet, inasmuch as it created defined districts into public or quasi-municipal corporations and authorized them to issue bonds and lend their credit, the grant of the power to issue bonds and to lend their credit would have conferred upon them the power to levy a general tax according to the established methods of general taxation.

> "*When authority* to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by *taxation*. It is therefore to be inferred,' as observed by this court in Loan Association v. Topeka (20 Wall 660), 'that when the legislature of a State authorized a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference'."

Per FIELD, J., *United States* v. *New Orleans*, 98 U. S. 381, 393.

See also:

Ralls County v. *United States*, 105 U. S. 733;

Breckenridge County v. *McCracken*, 61 Fed. 191;

United States v. *Saunders*, 124 Fed. 124, 128, 59 C. C. A. 394.

The power to levy a tax implied in the power to create a debt must of necessity relate to a general tax. An assessment for benefits requires special means of levy which do not usually exist without express legislation, but the means of raising money by general taxes is all pervading and continuous and can be availed of for the purpose of executing the implied grant of power.

What difference does it make that this power has been expressed? Is that any reason for holding that the language used does not mean just what it says? If the express power to issue bonds and create debt would carry an implied power of general taxation without expression, should not the same meaning be applied to the expressed power, in the absence of anything to distinctly convey a contrary meaning?

Even if this language were susceptible of the construction which the Court has placed upon it in the main opinion in the present case—something which we do not concede—the decision of the Court in so construing the statute, violates all the recognized canons of construction.

> "The rule is fundamental that if a statute admits of two constructions, the effect of one being to render the statute unconstitutional and of the other to establish its validity, the courts will adopt the latter."

per SUTHERLAND, J., in *Arkansas Gas Co.* v. *Railroad Commission*, 261 U. S. 379, 383.

See also:

Utah Mines v. *Beaver County,* 262 U. S. 325, 331, per SUTHERLAND, J.;

Texas v. *Eastern Texas Railroad Co.,* 258 U. S. 204, 217, per VAN DEVANTER, J.

> "This Court by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome *beyond rational doubt.*"

per SUTHERLAND, J., in *Adkins* v. *Children's Hospital,* 261 U. S. 525, at 544. Cited and quoted in *Everard's Breweries* v. *Day,* 265 U. S. 545, at p. 560, by SANFORD, J.

> "Both the meaning of statutes of a State and the rules of the unwritten law of a State affecting property within the State are peculiarly questions of local law to be ascertained and established by the State courts. For that reason Federal courts ordinarily hold themselves bound by the interpretation of State statutes by State courts."

per STONE, J., in *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, at 462.

> "But in passing upon such questions we follow applicable decisions of the highest court of the State."

BRANDEIS, J., in *Douglas* v. *Noble,* 261 U. S. 165, 168.

> "The plaintiff in error recognizes that this court is bound by the construction given to the State law by the State court, yet wastes a good deal of argument in the effort to prove the construction wrong."

Mr. Justice HOLMES, *in Yeiser* v. *Dysart,* 267 U. S. 540, 541.

> "It is a 'settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons'."

per Mr. Justice BUTLER, in *Swendig* v. *Washington W. P. Co.*, 265 U. S. 322, at p. 331, quoting from Mr. Justice VAN DEVANTER in *Logan* v. *Davis*, 233 U. S. 613, 627.

> "Even if the meaning were not otherwise made plain, we should be slow to reject the construction thus put on the section by the head of the department charged with administering it."

per Mr. Justice VAN DEVANTER, in *Kern River Co.* v. *U. S.*, 257 U. S. 147, 154.

See also,

La Roque v. *U. S.*, 239 U. S. 62, 64, per Mr. Justice VAN DEVANTER.

The practical construction placed upon the road district statutes, not only in Texas, but in other States, has uniformly been that a tax to pay district debts incurred for road construction purposes levied *ad valorem* upon all the taxable property in the district, both real and personal, according to the State and county assessment, is a general tax for every purpose. We have exhaustively examined the decisions, and our research has not disclosed to us a single case where such a tax has been held to be a special assessment.

The Legislature of Texas has so construed it, and has used apt language to confer a general power of taxation. The Courts of Texas have so applied it.

The general construction placed upon the terms has been that it is a general tax and many millions of securities payable from a tax of this nature have been issued, not only in Texas, but in ten or fifteen other States, as well. All of these securities are brought in question to some extent by the decision in the present case.

The decisions of the Courts, other than the Courts of Texas, have held similar taxes to be general taxation. There is a line of decisions in the reports the Supreme Court of the United States which is inconsistent with any other view than that a tax levied in the manner in which this tax was levied, is a general tax, which decisions never suggested the contrary or indicated that the impost might be a special assessment to be governed by the rules peculiar to special assessments. These decisions cover fifty years and offer evidence that the practical construction placed upon similar statutes, even in the Supreme Court of the United States, has been that this tax is a general tax. To such an extent has this been the case, that we respectfully submit to the Court that the present is a proper case to apply the principles of *stare decisis—rule of property* based upon acquiescence in the long line of decisions—and *practical construction* in the administration of the affairs of the respective States of the Union. The meaning of the term "tax" when used as in the present case, has become fixed and is a part of

> "the settled laws of the State applicable to all persons in like circumstances and conditions,"

a situation which does not come within the Fourteenth Amendment. We also submit, to use the

language of Mr. Justice SHIRAS, in *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 398:

> "It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation."

VII.

The evidence does not establish that Archer County Road District No. 2, was arbitrarily created or that the definition of its boundaries was a plain abuse of statutory authority.

We have heretofore argued, and we trust persuatively, that this District was formed, not for the purpose of levying an assessment on the basis of benefit, but in the legitimate exercise of the power of the State of Texas to create a public or quasi-municipal corporation, having the general power of taxation for road purposes. This argument is directed to sustaining the validity of the act of the Legislature of Texas. A different question is presented when the action taken under the statute is attacked on the ground that it was arbitrary and a plain abuse of discretion. This argument goes to the manner in which the statutory powers were exercised and assumes the existence of a valid statute.

It does not clearly appear from the opinion of Mr. Justice BUTLER whether this Court was of the opinion that there had been arbitrary action or abuse of discretion. Various remarks, however, have been made which tend to suggest that such was the opinion of the Court.

On this subject we wish to call the Court's attention to the fact that as stated in Mr. Justice BUTLER'S opinion, Road District No. 2 contains approximately one-half of the County, which is thirty miles square; that is to say, the extent of the District is thirty miles easterly and westerly, and fifteen miles in a northerly and southerly direction at least. In many eastern States, Counties have less territory than this District.

We have also pointed out above, that the assessed value of the plaintiffs' property consisting of 24,900 acres and any personal property that the plaintiffs may have in the District, is at the rate of $10.33 per acre. We have also shown above that the tax upon the plaintiffs' property on the basis of the first year's assessment is 4.17 cents per acre, or a total of $1.25 per acre spread over a period of thirty years.

We have also pointed out that the improvements involved in this case are the improvement of the "Ozark" Trail and the "Southwest" Trail, two State highways, State and inter-State in character, and in addition, two short stretches of county highways. There is no evidence in the case that the improvements to be made upon these highways will specially and peculiarly benefit any part of the District. So far as the testimony in the case goes, the benefit is general and it applies equally to all the lands in the District. There is no benefit of a special and peculiar nature such as is implied in an assessment of benefits.

The opinion of the Court below also refers to the fact that the District contains two Commissioners Precincts, although Mr. Justice BUTLER points out that there is no evidence of this fact. Possibly, it may have been conceded at the trial, or assumed

to be the case, as one of those facts within local knowledge. We do not understand that it is seriously disputed that such is the fact.

These rural improvements are the subject of local discussion for months in advance. The defendant Hooper testifies that such was the case in Archer County (Tr., fols. 70, 74). There were many meetings throughout the County at which the matter was discussed. The Commissioners were trying to arrive at some scheme, some understanding, so that everybody could vote for bonds for the entire County and not have it cut up into Districts (Tr., fol. 74).

The County was broken up in *blocs* and cliques; each wanted improved highways immediately adjacent his property; these plaintiffs frankly say so in their testimony (See, Edgin, plaintiff, fol. 98; Gant, plaintiff, fol. 103). The objection of each is the selfish objection that a road nearer him would benefit his property more. The testimony is the familiar testimony that no road except the particular road the witness desires can possibly be a benefit.

As against these the Commissioners acted for the benefit of the community as a whole. They sought the roads that would be the greatest benefit to the community. The "Ozark" and "Southwest" Trails, being State highways, State aid is available; the Ozark being a Federal highway, Federal aid is available. The Commissioners seek to take advantage of State and Federal aid; they designate these Trails,—the main roads in the northern half of the County. In so doing, they are surely furthering the interest of the community? These roads would not have been selected by the State for improvement, if they had not been the

most important highways in the District from the standpoint of the general public and the State, and that fact alone points to them as the roads to be first improved.

A county wide issue being impossible by reason of local jealousies, the selection of a District consisting of the northern part of the County through which these roads run is the natural alternative. The Commissioners took a broad view of the situation:

> "We figured the future growth of the county hinged on its transportation facilities and anything that would better the transportation facilities will certainly benefit the property of the residents of the County. It is too big a question for me to go into. * * * It is a system of highways all through that District that is a benefit to the District. The natural market place of the District is Wichita Falls. All of these roads pass through Wichita Falls." (Hooper, County Judge, Tr., fol. 72.)

The situation, therefore, discloses the setting apart of a large tract of territory which evidently requires improved highways and the expenditure of the major part of the moneys to be derived from the sale of this issue of bonds, in the improvement of two State highways which are required to give easy and satisfactory access to markets outside the District and presumably are the principal roads in the District. The County highways which are improved are apparently intended to connect with these State highways and the whole enterprise bears the marks, we submit, of such an enterprise as is intended to benefit the community, rather than the individuals.

It is stipulated in the present case that a Federal highway is entitled to dollar for dollar from

the Federal Government, and dollar for dollar from the State Government for each dollar expended by counties or subdivisions thereof (Tr., fol. 108.) This stipulation discloses the reason for the selection of these highways. The County Commissioners simply sought to take advantage of these aids, in the interest of the community as a whole.

Under these circumstances, we submit that the action of the County Commissioners Court in defining the boundaries of the District was reasonable, and that the plaintiffs were not prejudiced thereby.

The plaintiffs are not consistent. They seek to enjoin the defendants from doing that which the plaintiffs themselves sought to do. The plaintiffs openly admit that they seek roads of their choosing. The difference is, the roads selected have been selected with the public benefit in view. The plaintiffs ignore the public benefit and seek the improvement of roads for their exclusive benefit. Munchrath, a defendant and County Commissioner, has contributed to the prosecution of this action against himself (Tr., fol. 92). He wishes a road along the easterly boundary of the District.

> "I want to get a road somewhere that I can get out" (fol. 93).

He is indifferent to the improvement of the two Trails, though the action of the State and Federal governments has stamped them as trunk lines. Edgin, plaintiff, is in favor of good roads. He wants a road that will benefit him (fol. 98). He also is indifferent to the public interests.

Plaintiffs want another kind of district; one that will benefit their own property, even if it create debt up to the constitutional limit on a narow strip along the eastern boundary; and the roads to be

constructed therein are roads which none except those living immediately upon them ever use. They are not roads which have been adopted by the Federal and State government as main roads for immediate improvement for the general benefit. Plaintiffs do not care if a small district created according to their desires, will create a debt to the constitutional limit so that a wide and general improvement will be gravely hampered. The aims and objects of this suit are, not elevating, but purely selfish; they are aims and objects which certainly are not protected by the Fourteenth Amendment.

The popular sentiment, or rather, the sentiment of the property taxpaying voters, was strongly in favor of this District and the issue of bonds. Out of 405 votes, 303 votes were cast for and only 102 against the bond issue. The Constitution of Texas, as amended, refers the matter ultimately to the vote of the taxpaying voters and we respectfully submit that where the Constitution of a State—the organic law under which both plaintiffs and defendants live and hold their property—says that the creation of a public and quasi-municipal corporation may be effected by a popular vote and by the same means debt may be created and voluntarily taxes imposed, the Federal Courts are neither qualified, nor have they the machinery or the right to annul the exercise of a right of suffrage granted by the State, which in its nature, cannot impinge at any point on the Fourteenth Amendment.

We therefore respectfully submit that there is no room in the present case for the application of those decisions which say that the organization of a district for improvement purposes which is palpably arbitrary and an abuse of discretion, will be obnoxious to the provisions of the Fourteenth Amendment to the Federal Constitution.

VIII.

The attention of the Court is respectfully called to the fact that the Texas statute authorizes the issuance of bonds by counties and political subdivisions thereof, as well as by defined districts, and we respectfully ask the Court to make it clear, even if this application for a rehearing be denied, to what extent its decision is intended to apply to counties and political subdivisions.

The language of the opinion of the Court in this case is susceptible of the interpretation that even if the bonds were to be issued by the County as such, the taxes therefor would be regarded as a special tax for a special improvement. Thus, among other things, the opinion says:

> "The Commissioners Court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation. Art. 2242, Const. Art. 8, section 9. The expenditure of the moneys so raised is not limited to any specific roads."

This remark implies that even if the bonds are voted and issued by the County as such the moneys are to be expended for limited and specific purposes. Elsewhere the opinion further suggests the idea that in the opinion of the Court the statute contemplates the expenditure on specified roads only. We have endeavored to establish that such is not the case, but if we should not succeed in persuading the Court that such is not the case in the case

of defined district, is it to be assumed that the County is controlled by the same rules?

The same remarks apply to bonds issued and improvements constructed within political subdivisions of the counties.

Whilst it is scarcely to be believed that the Court intended to say that a tax levied by the County for road purposes on all the taxable property in the County according to the assessment for State and County purposes and to be applied in the payment of county obligations issued for road purposes, is a special assessment for a local improvement, yet it does not clearly appear that such was not the thought and the view of the Court, and we respectfully ask the Court to make it clear that there is nothing in its opinion which was intended to apply to that situation. This request is respectfully made in the interests of the many persons holding securities issued by the counties of Texas for road purposes.

IX.

WHEREFORE, your petitioner respectfully prays that a rehearing be granted herein, and that upon the rehearing, if granted, such decree may be made as the premises require.

DAN MOODY,
Attorney General of Texas.

C. A. WHEELER,
Assistant Attorney General of Texas.

JOHN W. DAVIS,
JOHN C. THOMSON,
W. P. DUMAS,
Of Counsel.

The undersigned respectfully certify that they believe that it is proper that a rehearing should be granted in this cause and that the application therefor is made in good faith and not for delay.

DAN MOODY,
Attorney General of Texas.

C. A. WHEELER,
Assistant Attorney General of Texas.

JOHN W. DAVIS,
JOHN C. THOMSON,
W. P. DUMAS,
Of Counsel.

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WM. R. STANS

IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

No. 256.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*,

Appellants,

v.

E. M. HOOPER, E. A. McDONALD, A. L. BISHOP, *et al.*,

Appellees.

PETITION FOR REHEARING AND ARGUMENT.

JOHN R. MOORE,
W. E. FORGY,
Attorneys for the Appellees and Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1925.

PERRY BROWNING, WM. COLEMAN, JAMES E. DALE, *et al.*, Appellants, v. E. M. HOOPER, E. A. MCDONALD, A. L. BISHOP, *et al.*, Appellees.	No. 256.

PETITION FOR REHEARING AND ARGUMENT.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of E. M. Hooper, E. A. McDonald, A. L. Bishop, E. A. Herndon, and Henry Munchrath, respectfully shows that your petitioners are the duly elected, qualified and acting Commissioners of Archer County, Texas; that they constitute the County Commissioners Court of said County; that this petition is filed on behalf of your petitioners as such Commissioners and also on behalf of the County Commissioners Court of Archer County, and of Road District No. 2 of Archer County, a public corporation.

Your petitioners further represent and state to the Court that the opinion in the action declares to

be unconstitutional a statute of the State of Texas, and has held that Road District No. 2 of Archer County is not validly organized under the said statute and cannot issue the bonds of said Road District referred to in the complaint herein.

Your petitioners respectfully show to the Court that since the opinion herein was handed down, the principles embodied therein, the practice under the act of the Legislature of the State of Texas which was before the Court, and the decisions and practice in other States have been the subject of much investigation and discussion, and your petitioners respectfully represent to the Court that such investigation and discussion have made it appear that the arguments on behalf of the defendants and appellees herein to sustain the organization of the District and the validity and regularity of the tax voted to secure the payment of the bonds herein and the constitutionality of the said statute, were not adequately and fully presented.

Your petitioners further respectfully represent to the Court that the opinion herein indicates that this Court has reached the conclusion that by the act of individual property taxpayers, a special district was carved out to furnish credit to pay for specified improvements on designated roads; that the existence of the district continuing during the term of the proposed bonds will prevent the improvement of roads needed to serve the territory in which the plaintiffs' lands are situated; that the purpose is special and the burden sought to be imposed on appellants' lands are special assessments for local improvements; whereas, your petitioners respectfully show to the Court that this construction is contrary to the decisions of the Courts of the State of Texas and the recognized and accepted

practice of the officials of said State in proceedings under the act.

Your petitioners further respectfully show that according to the accepted practice and according to the decisions of the State of Texas, roads are not designated as part of the petition for the creation of the District and the issuance of bonds; that the designation of the roads is a matter within the discretion of the County Commissioners Court and such roads need not be designated otherwise than by directing the expenditure of the moneys raised by the issuance of the bonds; that such discretion may be exercised at such time and in such manner as the Commissioners Court deems best in the public interest; that your petitioners have been advised by counsel that the County Commissioners Court is not deprived of discretion as to boundaries of the district, but it is its duty to enter an order fixing such boundaries and in so fixing the boundaries it is obliged to conform to the law, including those decisions of this Court which say that no district can be formed so as to arbitrarily deprive a man of his property without due process of law.

Your petitioners also respectfully show that they have been advised by counsel that it is within the discretion of the County Commissioners Court to fix such boundaries as said Court may deem proper and appropriate, and if the petition before the Court does not apply to such boundaries as fixed, then the petition must be either amended or denied.

Your petitioners further respectfully represent to this Court that a single issue of bonds does not exhaust the power and authority of the District; that it is within the power of the property taxpaying voters to present further and additional peti-

tions proposing the issuance of additional bonds; that this course may be followed by successive petitions until bonds have been issued to the ultimate limit of twenty-five per cent of the assessed value of the real property of the District, and the proceeds may be expended in the same manner on such roads as the Commissioners Court deems most to the public interest.

Your petitioners further respectfully show to the Court that the petition in this case had not for its primary purpose the making of the improvements, but rather the raising of money by which improvements may be made; that the purpose of the act is to authorize counties, political subdivisions thereof and defined districts to borrow money and to lend their credit for public purposes; that the tax to be levied is a tax which is appropriate and suitable for an issue of securities which are to be disposed of in open market; that such a tax is usually a general *ad valorem* tax and is not a special assessment based upon a local improvement.

Your petitioners further respectfully show to this Court that the obligations created by the issuance of bonds of defined districts must be met from the tax provided whether the improvements have been built or not; that the obligations constitute corporate debts which must be paid in any event without regard to the benefit to the property owner; that the roads and highways which are to be improved, form a part of the State and County system of highways; that the defined district as such has no power and jurisdiction over the improvement thereof, but the proceeds of the bonds are to be paid over and delivered to the County Commissioners' Court and are to be by it expended in the same manner as other money raised for the

improvement of public highways, *i. e.*, in the improvement of such highways within the district as best suits the interests of the community, and not in the improvement of highways for the purpose of benefiting any individual or sets of individuals.

Your petitioners further respectfully show that by the proceedings of the property taxpaying voters, the order of the County Commissioners Court defining the district, and calling the election, and the vote of the property taxpaying voters, a public or quasi-municipal corporation has been created with powers conferred thereon by statute of Texas; that such creation and grant of pow r raise questions only under the laws of the State of Texas, and do not present any Federal question; that it is within the power of the State of Texas to confer upon a corporation so created, the power of general taxation *ad valorem* for highway purposes without any relation to the benefit; that such power has been so conferred and the conferring of such power does not present any question under the Fourteenth Amendment to the Federal Constitution.

Your petitioners further respectfully show that they believe that if the foregoing reasons had been properly and adequately presented to the Court, a decision holding said statute unconstitutional would not have been rendered, but, on the contrary, the validity of the statute would have been sustained.

WHEREFORE, your petitioners respectfully pray that a rehearing on the appeal herein be ordered, and in support of the prayer of this petition for such rehearing, they respectfully submit to the court the following:

ARGUMENT.

I.

The correct construction of the Texas Statute does not contemplate specified improvements on designated roads or the levy of a special assessment.

The roads to be constructed are the "Ozark" Trail,—a Federal Aid road, as well as a State road, —and the "Southwest" Trail,—a State Highway,— and two short highways connecting therewith. The territory embraces the northerly half of Archer County, or approximately five hundred square miles. It is not any carefully selected territory paralleling or immediately bounding upon any highway, but is a territory of such extent that the Legislature of Texas might, if it saw fit, properly create it into a separate County.

The tax upon plaintiff's lands is only a few cents per acre per year, on the basis of the present assessment, and there is no individual hardship so far as the plaintiffs are concerned. Their rights and interests are presumably much better protected than if they were subjected to an assessment of benefits. It is difficult to conceive that any property could be as lightly taxed, even if the assessment were on the basis of benefits.

When the constitutional amendment of 1904 was adopted, the power of counties in Texas to levy taxes was very limited. The primary purpose of that constitutional amendment was the increasing of the power of taxation so as to create credit on the part of the counties, political subdivisions and

defined districts thereof. The existing general county road tax referred to in the opinion of the Court was wholly inadequate to meet highway requirements. The 1904 amendment was supplementary to the existing statute, not—as the opinion suggests—in contrast to it. The taxes to be levied were of the same general nature as the taxes which had previously been levied. This is shown by the use of the word "taxes" in the amendment of 1904. The purpose of the act related to means by which improvements should be made, i. e., by issuing bonds or otherwise lending credit, and by the levy of taxes, and did not relate so much to the actual making of the improvements. There is little in the act on the latter subject. It is left substantially to the general laws of the State.

The Supreme Court of Texas has referred to the fact that the purpose of the act related to the financial end, rather than to the construction end, of the improvement.

See

Aransas County v. *Coleman-Fulton Pasture Co.*, 108 Tex. 216, 191 S. W. 553.

The statute does not require that the petition shall designate the roads to be improved. In the present case the petition of the property owners did not designate the roads. In fact, the roads were not designated, either in the petition, or in the order defining the district and calling the election, or in the notice of election. The designation was made by the County Commissioners Court by a separate and independent order, which showed that the designation which was made by them, was made upon an interpretation of public sentiment of the Dis-

trict. It refers to the fact that the roads designated are the roads desired by the petitions and by "a large majority of the resident citizens and qualified voters." In other words, the County Commissioners Court, in the exercise of its discretion, designated the roads, using as a basis its interpretation of the expressed will of the voters. The roads so selected were the main traveled highways in the territory. The primary importance of the two trails is shown by the fact that both were State highways and one a Federal aid project. It is natural that these highways should be the highways favored by a majority of the voters.

The order designating the highways was a mere exercise of the discretion of the County Commissioners Court, although it may have been made at the time when the order was entered defining the district and calling the election.

See,

Limestone County v. *Garrett*, (Tex.) 236 S. W. 970;

Black v. *Strength*, 112 Tex. 188, 246 S. W. 79;

Grayson County v. *Harrell* (Tex. Civ. App.), 202 S. W. 160;

Wright v. *Allen* (Tex. Civ. App.), 257 S. W. 980;

Cannon v. *McComb* (Tex. Civ. App.), 268 S. W. 999;

Adams v. *Mullen* (Tex. Civ. App.), 244 S. W. 1083.

Under the case of *League* v. *Brazoria County Road District No. 13* (Tex. Civ. App.), 187 S. W. 1012

> "The determination of the area of the district, the sufficiency of the petition, and other prerequisites to the establishment of a valid road district was a matter peculiarly committed to the commissioners court."

This is inconsistent with the idea that the County Commissioners Court was obliged to accept the definition of the territory as contained in the petition of the taxpaying voters. Any idea that such definition is binding upon the Commissioners Court is doubtless caused by the fact that it is mandatory upon the County Commissioners Court to act upon the petition, although it need not accept the boundaries. With very rare exception, the boundaries fixed by the petition will be generally acceptable and out of the fact that action of the Commissioners Court is mandatory has probably grown the idea that such mandatory duty to act includes the obligation to accept the boundaries as presented in the petition.

But the Supreme Court of the United States has held that the boundaries of the district cannot be arbitrarily framed to subject property to unreasonable taxation.

See,

Kansas City Southern Ry. v. *Road District,* 266 U. S. 379,

and other cases, and the Commissioners Court was obliged to see that the boundaries did not conflict with this rule. In the present case, there can surely be no question as to the propriety of the boundaries. A territory consisting of approximately five hundred square miles, constituting the northerly half of a county thirty miles each way, was set apart and defined.

The cases cited by the plaintiffs and appellants herein do not apply. The discussion in these cases was merely incident to the questions before the Court, and in neither case was this matter at issue.

In *Huggins* v. *Vaden,* 253 S. W. 877, S. W. 204, two petitions were presented by conflicting districts, and the decision nowhere denies that the Commissioners Court had a discretion as between the two petitions.

Similarly, in *Meurer* v. *Hooper* (Tex. Civ. App.), 271 S. W. 172, two districts were proposed and the action of the Commissioners Court was practically sustained on the basis that the solution of the problem was within the discretion of the Commissioners Court. The authorities cited by the appellants, therefore, support the view that the boundaries are subject to the judgment and discretion of the County Commissioners Court.

When the bonds have been sold, the proceeds are to be applied and disbursed by the Commissioners Court on such roads as the Court may in its discretion select. This discretion may be exercised either before or after the election, but as an exercise, it is always the discretion of the Court and not the selection of the petitioners. The fund raised by the sale of the bonds is a corporate asset of the district and is subject to a judgment for damages for breach of contract.

See

Horn v. *Matagorda County* (Tex.), 213 S. W. 934.

The bonds must be paid whether the improvements are constructed or not.

See

Road District No. 4 v. *Home Bank & Trust Co.*, 5 Fed. (2d) 625.

The tax is to be collected as provided by law for the assessment and collection of school district special local taxes. These taxes are taxes that are voted by school district voters. The taxes so voted are for ordinary maintenance, as well as for the construction of improvements. They are levied and collected on real and personal property in the school district in the same manner as State and county taxes.

This tax in its nature is a general tax. It was authorized by a constitutional amendment which dealt with the financial aspect of the transaction, rather than the construction of the improvement. It was intended to be the security for an issue of bonds to be sold on the markets. It is the same kind of tax that is authorized by other Articles of the Texas Constitution.

See

Texas Const., Art. 8, secs. 1, 9; Art. 11, secs. 4, 5, 6, 7.

The Supreme Court of Texas has sustained the issuance of bonds secured by a tax which on its face is a general tax.

See

Simmons v. *Lightfoot*, 105 Tex. 212, 146 S. W. 871;

Munson v. *Looney*, 107 Tex. 263;

Harris County Drainage Dist. v. *Park* (Tex. Civ. App.), 148 S. W. 351;

Wharton County Drainage Dist. v. *Higbee*, 149 S. W. 385;
Robbins v. *Limestone County* (Tex)., 268 S. W. 915.

The debt is created under the constitutional amendment and statute to raise money to improve a rural highway. These highways are part of the general highway system of the State. A tax for this purpose has not usually been levied on the basis of benefit. The benefit to the lands is not usually special and peculiar. It is of the same nature in the case of property on or close to the highway as in the case of property at a distance from it, the only difference being that a person on or close to the highway can more easily reach the improved highway than the person at a distance from it. The difference in this respect from drainage, irrigation and street assessments which have a direct and immediate effect upon the lands is obvious. In the two former, water is taken from or placed upon the lands assessed. In the street improvements, the lands are made available for residence purposes, an opportunity is given to construct water and sewers and introduce a lighting system. In either case, the lands immediately adjacent to the improvement are directly and measurably benefited. In the case of highway improvements, the residents of the community at large, not the adjacent landowners, are generally benefited. We respectfully submit for these reasons that the tax is a general tax and not a special assessment.

The Court, we respectfully submit, has erred in saying that the creation of this district will prevent further improvement. The bonds in this case are serial bonds, the instalments available for re-

tirement beginning at $5,000 per year. Consequently, the amount of the debt will be reduced in each year. So, too, it is to be presumed that the assessed value of the taxable real property will increase from year to year. By both processes additional borrowing power is created. The assessed value of the real property of the district is $2,800,000. (See Tr., fol. 50). If there be no other debt for any of the purposes mentioned in section 52 of Article 3 of the Constitution, as amended, this district might issue bonds to the amount of $700,000; the present proposed issue is only $300,000. Therefore, further issues may be made to the amount of $400,000, if there be no other debt chargeable against the debt limit. Plaintiffs may, if they see fit, petition that the district issue bonds to improve the highways immediately adjacent to their lands. Thereupon, it will be the duty of the County Commissioners Court to receive the petition and to act upon it, and, if regular, to order an election. The designation of the highways may be approved or may not be approved by the County Commissioners, as the public interests require. The public interests always control.

The tax authorized by the statute for the payment of road bonds is a general tax. The Supreme Court of Texas has said that the constitutional amendment was adopted for the purpose of conferring larger and wider powers of raising money. The tax which is provided by the statute is intended to be a tax for the payment of money so raised by loan upon a bond issue. The money that is to be raised by tax is for the payment of the corporate debts of the district, and not to effect any particular improvement. The improvement is within the discretion of the County Commissioners

Court, and that court, if it performs its duty, can select the highways most to the public interest. Hence, every element of special assessment is absent. There is no peculiarity in the improvement, there is no peculiar benefit to the property, and the money is to be applied not in the improvement itself, but in the payment of corporate debts and liabilities.

The fact that the authority conferred was intended to be exercised by an issue of negotiable bonds, may properly be considered in construing the statute.

See

United States v. *Clark County,* 96 U. S. 211;

Gunnison County Commissioners v. *Rollins,* 170 U. S. 255, 275;

Denver v. *Home Savings Bank,* 236 U. S. 101, 104.

If the authority conferred had provided for a special assessment according to benefits, and not a tax *ad valorem* based upon the State and County assessment, the marketability of the securities would have been seriously affected, and the district would not have been able to borrow money on satisfactory terms. It would have imposed an additional burden upon the property owners if they sought to exercise the authority conferred by the

The tax which is authorized is as we have shown of the same general character as other taxes authorized and required to be levied for the payment of debts and liabilities.

We therefore respectfully submit that the statute does not provide for a specified improvement on a designated road; that the authority conferred

on the district is continuing, and will permit the improvement of all the roads in the district, including those in which the plaintiffs are directly interested, so long as the debt created is within the constitutional limit.

II.

The decisions outside of Texas have treated road district taxes as general taxes and have held that they are not special assessments.

In *Cooley on Taxation*, (4th Ed.), vol. 1, section 31, p. 106, the differences between a special assessment and a tax are stated. The tax in the present case does not contain any of the peculiar features which distinguish a special assessment. It is not levied on land but on the contrary, it is levied on both real and personal property. The personal liability is not on the basis of a special assessment, but on the basis of ordinary county taxes. It is not based wholly on benefit, and it is not exceptional either as to time or locality. It extends throughout the taxing district and an annual levy must be made in each year, whilst the bonds are out. The benefit to the tax payer is implied in all tax levies, but in the case of a general tax strictly so-called, the benefit is one which is general to the community. In the case of a special assessment, the benefit is one which is special and peculiar to the property owners. Mr. Justice BROWN in *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 203, treats "roads" as one of the public conveniences in which the taxpayer shares. He says that he is liable to a road tax "though he never use the road."

To the effect that road taxes in rural territory are not special assessments, see

People v. *Whyler*, 41 Cal. 351;
Shoshone Highway Dist. v. *Anderson*, 22 Idaho, 109, 125 Pac. 219;
Hopkins v. *Special Road & Bridge Dist. No. 4*, 73 Fla. 247, 74 So. 310;
Charlotte Harbor & N. R. Co. v. *Welles*, 78 Fla. 227, 82 So. 770; s. c. 260 U. S. 8;
Griggsby Const. Co. v. *Freeman*, 108 La. 435, 32 So. 399;
Wight v. *Police Jury*, 264 Fed. 705;
Maltby v. *Tautges*, 50 Minn. 248; 52 N. W. 858;
Gulf & S. I. R. Co. v. *Ducksworth*, 286 Fed. 645;
Reed v. *Howerton Engineering Co.*, 188 N. Car. c. 39, 123 S. E. 749;
Miller v. *Hixson*, 64 Ohio St. 49, 50;
Howes v. *Racine*, 21 Wis. 514;
Hale v. *Kenosha*, 29 Wis. 599.

We respectfully call the attention of the Court to the case of *In re Bonds of Orosi Public Utility Dist.*, (Cal.), 235 Pac. 1004, where the Court considered the question whether a water tax in rural territory was a special assessment. It held that it was not.

We also respectfully refer the Court to those cases which hold that a rural highway is not a local improvement and consequently cannot be made the basis of a special assessment.

See,

Graham v. *Conger,* 85 Ky. 582;
Conger v. *Bergman,* (Ky.), 11 S. W. 84;
Conger v. *Graham,* (Ky.), 11 S. W. 467;
Sperry v. *Flygare,* 80 Minn. 325;
In re Washington Ave., 89 Pa. St. 352.

In States where a rural highway is not a local improvement, the only tax which can be levied therefor is a general tax. A special assessment cannot be levied. In those States what is the tax which was levied in the present case? Is it a tax or a special assessment? The decision of the Supreme Court asserts that it is a special assessment, but the decisions of the State Courts say that no special assessment can be levied therefor.

III.

Road District No. 2 of Archer County has been created as a public and quasi-municipal corporation with the power to levy general *ad valorem* taxes to pay its corporate debts and liabilities, and no Federal question is involved.

We have referred above to the nature of the tax which has been levied in this case. Section 637 of the General Revised Civil Statutes 1911, declares that a road district accepting the benefits of the statute is a body corporate. It is within the power and discretion of the Legislature of Texas to create the district into a body corporate of a quasi-municipal character. The creation of such a corporation does not violate any provision of the Federal Constitution.

See,

Kelly v. *Pittsburgh*, 104 U. S. 78;
Forsyth v. *Hammond*, 166 U. S. 506;
Claiborne County v. *Brooks*, 111 U. S. 400;
McCain v. *Des Moines*, 174 U. S. 168;
Hunter v. *Pittsburgh*, 207 U. S. 161.

Mr. Justice BRANDEIS in *Missouri Pacific R. Co.* v. *Road Dist.*, 266 U. S. 187, 190, said:

> "Road building is a public purpose which may be effected by general taxation. * * * The Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed."

The tax which is levied is of the same character that would be implied if the power to create the debt were conferred without any specification of the means of meeting it. That such a power implies the authority to levy a tax,

See,

United States v. *New Orleans*, 98 U. S. 381, 393;
Ralls County v. *United States*, 105 U. S. 733;
Breckenridge County v. *McCracken*, 61 Fed. 191;
United States v. *Saunders*, 124 Fed. 124, 128.

Finally, we respectfully submit that in a case of doubt, the Court should adopt that construction which will sustain the constitutionality of the Act.

Arkansas Gas Co. v. *Railroad Commission*, 261 U. S. 379;

Utah Mines v. *Beaver County*, 262 U. S. 325;
Texas v. *Eastern Texas R. Co.*, 258 U. S. 204;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Everard's Breweries v. *Day*, 265 U. S. 545.

The meaning of the statute of a State and the rules of a State affecting property within the State, are peculiarly questions of local law to be ascertained and established by the State Courts.

Hines Trustees v. *Martin*, 268 U. S. 458;
Douglas v. *Noble*, 261 U. S. 165;
Yeiser v. *Dysart*, 267 U. S. 520, 541.

Under these decisions we submit that any doubt as to the constitutionality of the act should have been resolved in favor of the validity thereof.

IV.

The evidence does not establish that Archer County Road District No. 2 was arbitrarily created or that the definition of its boundaries was a plain abuse of statutory authority.

We have heretofore pointed out that Road District No. 2 contains approximately one-half of Archer County, the northerly half. In so defining it, no arbitrary boundaries were drawn, nor is there any evidence any where in the record, that the plaintiffs' property was brought within the District for the purpose of contributing to the levy without

participating in the improvement. So far as the testimony in the case goes, the benefit is general and applies equally to all lands in the District.

Rural improvements of this character are the subject of local discussion for months in advance. Such was the case here. Representatives of each section of the County desired improvements immediately adjacent to their lands. The Commissioners were confronted with the necessity of acting for the benefit of the community as a whole. In so doing, they designated important State and National highways as the objects to be improved from the funds to be collected. In so doing, they took into consideration the future growth of the County, its natural market outlet in the City of Wichita Falls, and other economic factors which could be important only to the District as a whole.

The Commissioners desired the participation of the entire County in this general improvement (Tr., fol. 74). Local cliques prevented the attainment of this object. The designation of the northern half of the County was a reasonable compromise effective to secure the general benefit. In this it is submitted that the plaintiffs have not been unreasonably prejudiced.

The plaintiffs frankly admit that their objective is improved roads of their own choosing,—the present plan contemplates roads selected with the general public welfare in view. In this, the plaintiffs are not consistent. They seek to enjoin the defendants from acting for the public benefit, because they have ignored the plaintiffs' prayer for special benefit to the plaintiffs.

The sentiment of property taxpaying voters of the District was strongly in favor of the public benefit and opposed to the selfish object of the plaintiffs,

as witnessed in the casting of three hundred and three out of four hundred and five votes in favor of this issue.

It is respectfully submitted that there is no room in the present case for the argument that the District has been selected with palpably arbitrary boundaries in such a way as to contravene the provisions of the Fourteenth Amendment.

CONCLUSION.

Your petitioners respectfully pray that a rehearing be granted in this case, and that upon the rehearing the Court make such decree as the premises require.

Respectfully submitted,

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The undersigned respectfully certify that they believe that it is proper that a rehearing should be granted in this cause and that the application therefor is made in good faith and not for delay.

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